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W. T. BAGGETT, H. G. PLATT, } EDITORS.

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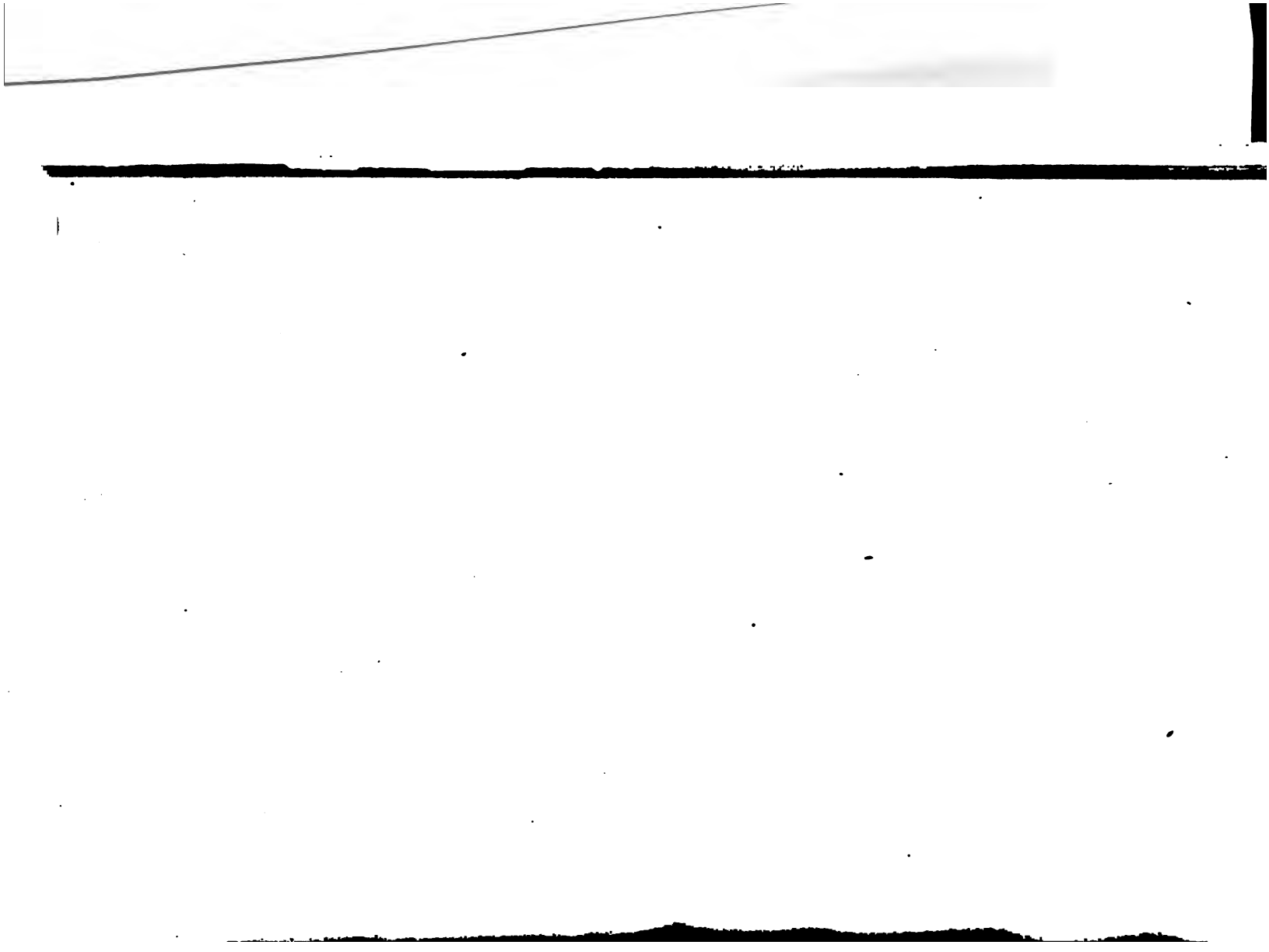

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Current Topics.

HUSBAND AND WIFE.

A recent decision of the Court of Session in a case of *Thompson* v. *Thompson* affords, in rather a new direction, an illustration of the change which is coming over the relation of husband and wife in the eye of the law. We have not the full facts of the case before us, but, so far as we understand, it was an application by the wife for the allotment of a sum of money in the name of ailment for her child and expenses of her own case. The application was refused, Lord Fraser, in giving judgment, resting his decision on the ground that the principles established in the last Married Women's Property Act involved a modification of the practice of the Courts in respect to alimony. "I have come to the conclusion," his Lordship is reported to have said, "that in consequence of the recent Married Women's Property Act a wife in an action of divorce must in future litigate at her own charges like any other litigant. A woman can now carry on business like her husband, and earn her own livelihood like him, and there is, therefore, no ground for the insistence on the rule which formerly prevailed, and which has worked practical injustice in a great many cases." Without knowing precisely the circumstances before the Court, it is impossible to estimate the full effect of the above language. It is clear, however, that his Lordship regards himself as enunciating to some extent a new principle, and the point is one which is likely sooner or later to occupy the attention of the English Courts. So far as we are aware, it has

been the practice in Scotland, as well as in England, to take into consideration any existing income of the wife, whether arising from her own exertions or from other sources, in allotting alimony *pendente lite*. But to make allowance for the mere capacity of the woman to earn her own living, if that was the point decided by Lord Fraser, is, we believe, an innovation on the existing practice in Scotland, and, except in very exceptional cases, in England also. At any rate, Lord Fraser's language shows the very unexpected ways in which the Married Women's Property Act from time to time operates. The Act is, indeed, a double-edged tool, and the above is only one of the many cases which have recently proved its capacity for cutting in either direction.--*London Law Times.*

AFFIDAVIT OF MERITS.

There has been much uncertainty as to the correct phraseology of an Affidavit of Merits. In view of this, we give the followin rulings of our Supreme Court:

"That he has fully and fairly stated his *case* to counsel" (*Woodward* v. *Backus*, 20 Cal. 137), held good.

"That he had fully and fairly exhibited and made known his *defense* to counsel" (*Bailey* v. *Taaffe*, 29 Cal. 426), held good.

"That he has fully and fairly stated his *defense* in this action to his counsel" (*Nickerson* v. *Cal. Raisin Co.*, 10 Pac. C. L. J. 46), held not good.

"That he has fully and fairly stated *the facts of the case* to hi counsel" (*Nickerson* v. *Cal. Raisin Co.*), held good.

"That he had fully and fairly stated the *case* to his counsel" (*Buel* v. *Dodge*, 11 Pac. C. L. J. 527), held good.

"That he is advised that he has a good defense" (*Reidy* v. *Scott*, 53 Cal. 72), held good; but not as satisfactory as the phrase, "a good defense on the merits of the action."

THE TWINS PROBLEM.

A Kentucky gentleman, on his death-bed, made a will, in which he bequeathed to his wife, who was *enceinte*, in case she should be delivered of a daughter, one-half of his estate, the other half to such daughter; but in case the expected heir was a son, one-third was to go to the wife and two-thirds to such son. Shortly after the testator's death the wife gave birth to twins—a boy and a

girl. The question now puzzling the lawyers is: How shall the estate be divided? The wife claims one-half the estate because she had a daughter; the daughter's guardian claims one-half the estate under the will, and the guardian of the son vows he will not accept less than two-thirds of the estate. The matter is now pending in the Hickman Circuit Court. While the Judge is trying to solve this question, the lay members of the profession are trying their "'prentice han'." One attorney in New York city thinks it a case of "lapse;" that the "testator" died intestate, and that the law must make his will. Another, writing from Frankfort, Ky., says: "My solution of the question is, to construe the will as devising to the mother five-twelfths of the estate, to the daughter three-twelfths, and to the son four-twelfths; that is, one moiety to the mother and daughter in the proportion of one-half to each; and the other moiety to the mother and son in the proportion of one-third to the mother and two-thirds to the son." And a Hoboken attorney comes to the same conclusion. He says that he "simply bequeathed his estate twice. If he left a daughter, he gave half to the widow and half to the daughter. If he left a son, he gave one-third to the widow and two-thirds to the son. So, each legacy abated fifty per cent. The widow took five-twelfths, the daughter one-fourth and the son one-third."—*Ohio Law Journal.*

From Cincinnati and Toledo comes another solution, viz.:

"Is not the following a more equitable division all round: One-fourth to the wife, one-fourth to the daughter, and one-half to the son? This carries out the testator's intention to make the wife and daughter share equally, and son receive twice as much as the wife. He did not devise the estate twice, but only once upon contingencies—the ultimate events fulfilled neither contingency alone, but partook of each."—*Ohio Law Journal.*

The New York attorney is correct. There is a lapse. The husband evidently did not intend to beget twins. Such a result would have been to him equally flattering and surprising. He was aware of a certain amount of uncertainty in such matters, and therefore made provisions to suit *either* of two results, but not *both*. He had no idea or intention as to *both*. There was no will as to *both*. The gallant thing on the part of the boy would have been to stay back until he could get another father. In California the widow would get one-third and the children one-third each, if it was separate property, but if it was community property, the widow would get two-thirds, and the children one-sixth each.

"SUING THE STATE."

[From a Paper read before the Kentucky State Bar Association.]

BY GEO. M. DAVIE, ESQ.

If one happens to be in Washington during a session of Congress, he cannot but be surprised at the great number of "claim brokers" and "Parliamentary agents" there congregated. He will see lobbyists of all colors and degrees, and who are bent on all manner of designs against the Government. Claims, some of them just, no doubt, but others of a character so extravagant and far-fetched that they could not stand judicial investigation for an instant, are "put through," often by their titles, in a manner which seems inconsistent with accurate justice. Each member appears to be the father or guardian of a family of bills, and is on the watch for the most opportune moment to "call them up," possibly in the absence of those whom he thinks might oppose them. For, in Parliamentary practice, different from judicial proceedings, it seems to be considered not only proper, but "enterprising," to secure the passage of claims without notice to the opposition.

No member, be he ever so diligent and faithful to the public interests, can pretend to investigate, understand, watch over and keep up with the thousands of claims which are introduced at each session, and each of which is sought to be successfully "engineered" by its "friends." In the rush of business, there is neither time nor opportunity to adequately consider them; and it is constant rumor that heavy claims are "slipped through" that would shock the sense of justice if the facts against them were made known by an open trial.

Thus Congress, in full operation, has often the appearance of a place where everybody speaks at once and nobody listens; where claims are heard *ex parte;* where judgments are by default; and where the deliberate man is dusted in the distance. To such an extent is this recognized, that Congress is spoken of as the National Claims Mill, and its members as mere "Claim Agents." This is, at present, the national mode of suing the State.

If one attends a meeting of a State Legislature, the same spectacle is witnessed, on a proportionately smaller scale. The mem-

ber comes prepared with certain claims against the States, or is intrusted with them by his friends in the lobby. Under the zeal of advocacy, and the desire to be considered efficient, he presents these claims as "bills," nurses them through the committees, and works them in by sharp tactics, trading votes, or by some of the other strategies familiar to statesmen. Without securing the proper influences, claims, however meritorious, are liable to be neglected or rejected; while, with "the influence properly attended to," claims, however objectionable, may often be "put through."

The result is unfortunate in a double way. Many claims that are unjust or excessive are allowed, to the great injury of the State; while many just claims are rejected, to the great wrong of the citizen. Is it any wonder that modest claimants often give up and retire in despair, and that questionable lobbyists flock and flourish. That such a system is a most crude and imperfect, and, indeed, pernicious, mode of settling the disputes of the citizen with the State, is apparent; and that it is far inferior to the system of judicial investigation, both in fairness and accuracy, is equally evident.

Yet, singular as it may seem when thoughtfully considered, this is the established and accepted American mode of determining claims against the State. To these dubious processes every one must resort to obtain justice from the Commonwealth; and upon them the Government must depend for protection from false or extravagant demands.

Under this system, the loose legislative committee takes the place of a Court. The whisper of the lobbyist is the argument of counsel. The rambling talk of the committee-room is the trial, in which the committeeman is often the advocate or the enemy as well as the Judge. Then, too, the hurry of the session and the excitement of politics forbid due deliberation.

To arrive at justice in controversies between individuals, or where the State sues an individual, there is provided the learned and unbiased Judge, the dignified Court, full notice to both sides, the introduction and analysis of the evidential facts, a deliberate and impartial trial, and an appeal to a full bench to correct possible errors.

But, when the claim is one by a citizen against the State, all is changed. A session of the Legislature must be awaited. The

claim must be introduced as a bill. It must be referred to an untrained committee of accidental composition. No time, place or rule is fixed for preparation or introduction of evidence. There is often but a hurried, gossipy, and not very dignified discussion, perhaps without notice to the other side. Neither learning nor impartiality are required, and the bill is thus "put through," or "sat upon," or "pigeon-holed" (to use the technical terms of the system), according to the activity of the lobby, the distribution of influences, or as fortune may be for or against it.

The origin of this anomalous state of things, in which the Legislature is made to act as a Court, is attributable to a maxim, prevalent in American jurisprudence, that "the State, being a sovereign, cannot be sued."

Applying this maxim, the Courts decline to take jurisdiction of claims against the State, and turn them over to the Legislature and the lobby.

Tracing its origin, we find that prior to the reign of Edward I. (about A. D. 1300) the law of England seemed to be that the Courts should be open to all, and that remedial writs might issue against the King as against any other person. (See *Chisholm* v. *Georgia*, 2 Dallas, 460; *United States* v. *Lee*, 106 U. S.) The form of the writ is given by Bracton: "Command Henry, King of England, etc.;" and Bracton says that "by law the King, in receiving justice, should be placed on a level with the least person in the kingdom." (See *Chisholm* v. *Georgia*, 2 Dallas, 460.)

During the long reign of Edward I. the power of the Crown had increased, until that monarch asserted himself as above the reach of the law. "He took care," says Hume, "that his subjects should do justice to each other, but he desired always to have his own hands free in all his transactions, both with them and his neighbors." (Vol. I. 306.)

Under the despotic reigns of the Tudors and the Stuarts the fictions of the divine right of the King, his inability to do wrong, and his immunity from suit, had become the accepted law of England; and it was still considered in force when the accomplished courtier Blackstone wrote his commentaries, to be presented to King George III., and for which he received a handsome reward and a Judgeship from that despotically-inclined monarch.

In those commentaries, first published in 1765, and which have had a very powerful effect in shaping American law, treating of the "King's prerogative," Blackstone says:

"First, then, of the royal dignity. Under every monarchical establishment it is necessary to distinguish the Prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as a man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand, yet the mass of mankind will be apt to grow insolent and refractory if taught to consider their Prince as a man of no greater perfection than themselves. The law therefore ascribes to the King in his high political character not only large powers which form the prerogative, but likewise certain attributes of a great and transcendent nature, by which the people are led to consider him in the light of a Superior Being and to pay him awful respect. * * * Hence it is that no suit or action can be brought against the King, even in civil matters."

Speaking further of this prerogative of royal dignity, Blackstone says:

"The law ascribes to the King the attribute of sovereignty. He is sovereign." This prerogative, he further says, is "in its nature singular and eccentrical; that is, it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects. For if once any prerogative of the Crown could be held in common with the subject, it would cease to be a prerogative any longer."

It will be observed that this immunity from suit is based upon the idea of that "royal dignity" and "awful majesty" which is one of the prerogatives of the King. It is classed by Blackstone with the other royal characteristics: that the King is by Divine right; that the King is perfect, and that the King can do no wrong.

It is upon this ground of dignity that the immunity of the sovereign from suit still rests in England, as will be seen from the Lord Justice's opinion in *Queen* v. *Commissioners*, Law Reports, 7 Queen's Bench, 394, decided in 1871:

"When a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim, even in appearance, to have any power to command the Crown; the thing is out of the question. Over the sovereign we can have no power."

This English rule was of course the rule in the American colonies, and after their independence it was uncritically applied, by a false analogy, to the American States.

In *U. S.* v. *Lee*, 106 U. S., it is said that "the doctrine met with a doubtful reception in the early history of this Court," and that though it has since "been treated as an established doctrine," yet "the principle has never been discussed nor the reasons given."

That this principle of leaving the citizen without any lawful rights as against the State, and completely at its mercy, is contrary to the republican theory of rights, can hardly be doubted.

The separation from England was chiefly justified by the failure of the British Government to afford a hearing and lawful remedy for the wrongs of the people. The preamble to the Federal Constitution declared that its purpose was to "establish justice," and that instrument forbade any State to deprive the citizen of his property or to impair its contracts with him.

The State constitutions were even more explicit as to our republican Government having no royal prerogatives or royal immunities to violate contracts or to perpetrate wrongs upon citizens without lawful redress. Throughout all those instruments, the Government, Federal or State, appears, not as a sovereign clad in royal prerogatives, but as a mere agency adopted to perform certain duties of general importance to the people, and its officers appear, not in the immunity of "awful majesty," but merely as paid agents, employes or servants of the citizen, to perform certain specified work for him.

Every lawyer's observation affords examples to him how often the rule has been applied to aid practical repudiation by the State, or by its officers, of debts due to others, and how often the State has been compelled to pay false or excessive claims by legislative looseness, which it never would have been made to pay if the alleged creditor had been compelled to establish its integrity in a Court of justice.

If an individual violates his contract with another individual, or injures him in any way, it would be considered as inconsist-

ent with American ideas of justice and human rights to refuse the injured one access to the Courts. If a citizen owes the State money, or injures the State in any way, no one has ever thought of contending that the Courts of the State are not open for the State to sue for its rights.

But, on the other hand, if the State borrows money from a citizen and fails to repay it, or seizes the citizen's lands and refuses to vacate, or takes the citizen's chattels and refuses to restore them, or employs the citizen and refuses to pay him for his labor, or induces him to act on a contract and then repudiates it, or unlawfully injures his person or property, we find that, under the false analogy of the royal prerogative, the citizen is refused access to the Courts, and is driven to the lobby.

That this undemocratic and unrepublican idea of holding the State above the reach of human justice, ever obtained a footing in American jurisprudence, is very surprising. The poverty of our language, perhaps, must bear some of the responsibility for the error. The word "sovereign" was incautiously applied to the American States to represent strongly the idea of their independence. And the word "sovereign" being already in general use in the English law-books to represent the King, the maxim that the sovereign (meaning the King) cannot be sued, was heedlessly adopted, as applicable to the "sovereign" State. "The law," says Blackstone, "ascribes to the King the attribute of sovereignty. Hence it is that no suit or action can be brought against the King." But says Mr. Justice Wilson, in *Chisholm* v. *Georgia*, "To the Constitution of the United States, the term Sovereign is totally unknown." (2 Dallas, 454.)

The early Judges, accustomed to the idea while under the King, overlooked its inappropriateness here. Or, perhaps, as the States were heavily in debt just after the revolution, the Courts were eager to adopt any maxim that would, under the guise of law, give temporary or entire immunity from liability to their passing creditors. "It is a part of our history," says Judge Story, "that at the adoption of the Constitution all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal Courts formed a very serious objection to that instrument. Those who were inhibited from commencing a suit against a State were persons who might probably become its creditors." (*Cohens* v. *Virginia*, 6 Wheaton.)

Under the American idea, the object of establishing the Government being to prevent people from suffering irremedial wrongs and to afford them justice, the adoption of the theory of the non-suability of the States, tends to defeat the chief purpose for which a government is desired. It is, therefore, conceived that it would have been far better and more logical if this monarchical maxim had never been imported, but had been left out of our jurisprudence, under the wise rule laid down by Chancellor Kent, that the "English Common Law and its maxims are to be treated as in force only so far as they are applicable to our government, institutions and circumstances."

Once adopted, however, from whatever cause, the rule has been retained, like many of those other "harsh and repulsive maxims of the Common Law," which Judge Cooley remarks may still be traced in our jurisprudence, "long after their reason has passed away."

And, as it frequently happens, when a wrong rule has been fixed, the latter Courts have endeavored to produce ingenious reasons as an apology for continuing to enforce it.

(To be continued.)

Supreme Court of California.

DEPARTMENT No. 2.

[Filed August 9, 1883.]

No. 8395.

DEAN, APPELLANT,

v.

WALKENHORST ET AL., RESPONDENTS.

FRAUDULENT TRANSFERS—CONSTABLE. One Swift, being the owner of certain cattle, sold the same to Mary Crowder, but no delivery was made. A few days thereafter Swift and Mary Crowder intermarried; Swift continued in possession of the cattle, with the knowledge and consent of his wife, and branded them with his recorded brand. Afterward, Swift, with the knowledge and consent of his wife, executed a bill of sale in his own name of the cattle to Dean, the plaintiff. *Held:* in an action by plaintiff against an officer for seizing the property for the payment of a debt against Swift, created during the time he held possession, that the transfers were all fraudulent.

Appeal from Superior Court, Modoc County.

E. M. Barnes for appellant.
E. Turner and *F. W. Ewing* for respondents.

MYRICK, J., delivered the opinion of the Court:

Action against a constable and his sureties for an alleged unlawful seizure of twenty-nine head of cattle and a bay filly. Judgment went for defendants, and plaintiff appealed.

On the 28th of August, 1876, one Swift was the owner of the property in question. On that day he sold the property to Mary Crowder, but no delivery or effort of delivery of possession was then or at any subsequent time had. A few days after the sale, Swift and Mary Crowder intermarried, and have been ever since, and are, husband and wife. Swift had possession and control of the property, with the knowledge and consent of his wife, until the seizure by the constable, March 26, 1881. While so in his possession the cattle were branded with the recorded brand of said Swift, with the knowledge and consent of his wife. On the first of March, 1880, Swift, with the knowledge and consent of his wife, in his own name, executed to plaintiff a bill of sale of the cattle; Mrs. Swift did not sign the bill of sale, but directed the transaction, and her husband acted fully and solely under her directions. Plaintiff paid $540 for the cattle; he did not take possession, but they remained, as before, in the possession of Swift. The debt on which the constable seized the property was created in 1880 and 1881.

Under such circumstances, neither the plaintiff nor Mrs. Swift could be heard to say the property was not the property of Swift, and liable to seizure for his debt. Mary Crowder, while single, and subsequently when Mrs. Swift, permitted the property to remain in the possession and control of Swift, permitted him to place his brand upon it, and to execute a bill of sale of it in his own name; the plaintiff took the bill of sale from Swift as of his property.

Section 3440 Civil Code reads: "Every transfer of personal property, * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession," etc. Swift had the possession and control of the property at the time of the alleged transfer to Mary Crowder, and such possession and control continued until after the creation of the debt for which it was seized, and until the

seizure; therefore, the transfer from Swift to her was void as to his creditors, and plaintiff took no title from her. (*Watson* v. *Rodgers*, 53 Cal. 401.)

In either view, whether the plaintiff claims under Swift or under Mrs. Swift, he cannot recover.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 2.

[Filed August 9, 1883.]

No. 8821.

IN THE MATTER OF THE ESTATE OF ROBERT CHALMERS, DECEASED.

ADMINISTRATION — JURISDICTION — HOMESTEAD — MORTGAGE. The Superior Court, sitting as a *Probate* Court, has no power to set apart homestead premises (the declaration having been made during the life-time of deceased) *subject to the liens and payment of existing mortgages.*

Appeal from Superior Court, El Dorado County.

C. F. Irwin and *G. J. Carpenter* for appellants.

Geo. G. Blanchard and *W. L. Dudley* for respondent.

MYRICK, J., delivered the opinion of the Court:

The widow of deceased petitioned that certain real estate be set apart to her as a homestead. Opposition thereto was made by persons holding mortgages of the real estate executed by the deceased in his life-time. The Court found, as facts, the execution of the mortgages, adjudged that the mortgagees are entitled to have the mortgages foreclosed, and that the mortgages are subsisting liens and incumbrances upon the property, and made a decree setting apart to the widow as a homestead the premises described in the petition, "subject, however, to the liens and payment of each of the said mortgages, in the findings herein set forth." From the clause of the decree above quoted the widow appealed.

Doubtless the Court below, sitting as a Probate Court, would have power to consider the existence or non-existence of a mortgage upon a specific parcel of real estate of the deceased, for the purpose of determining what parcel should be set aside, in case of a selection to be made by the Court; but where, as in this case, the declaration of homestead was made during the life-time of the deceased (the mortgages

being executed prior to the declaration), we find nothing in the statute which requires the adjudication of the Court as to mortgages, or which authorizes the Court to set apart the property *subject to the liens*. Whatever remedy might exist under Section 1241 Civil Code would be for application in proceedings for foreclosure—not in the probate proceedings for setting apart. It is barely necessary to remark that the provisions of Section 1475 C. C. P. are not for consideration on this appeal.

The cause is remanded, with instructions to strike from the decree the clause above quoted; in other respects, the decree is not appealed from.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 2.

[Filed August 16, 1883.]

No. 8874.

HAMLIN, RESPONDENT, *v.* HIS CREDITORS, APPELLANTS.

INSOLVENCY—AMENDMENT—ORDER—DISCHARGE—APPEAL—JUDGMENT. After the Court had refused respondent a final discharge in insolvency a motion was made that he be allowed to amend his pleading and papers, and also that the Court vacate the order refusing the discharge, which motion was granted, and subsequently respondent was discharged. An appeal was taken from the judgment of discharge. *Held:*

(1.) Conceding that the refusal of the Court to grant a final discharge constituted a final judgment, and that it does not appear there were sufficient grounds for vacating it, the order vacating it was simply erroneous and reviewable only on a direct appeal.

(2.) While the judgment subsequently entered is appealed from, that appeal does not bring the order made after the former judgment up for review.

(3.) The rule that the appellate Court will not disturb an order granting or denying leave to amend pleadings and other proceedings in civil cases, except where there has been an abuse of discretion, applies to cases of insolvency.

Appeal from Superior Court, Sutter County.

Bliss & Singer for respondent.

Barney & Sanborn for appellants.

SHARPSTEIN, J., delivered the opinion of the Court:

Conceding that the refusal of the Court to grant respondent a final discharge from his debts constituted a final judgment, and that it does not appear that there were sufficient grounds for vacating it, the order vacating it was simply erroneous, and reviewable only on appeal. But it was not appealed from, and has not been vacated. And until vacated

or reversed it is final. It cannot be reviewed here except on a direct appeal from it. The judgment subsequently entered is appealed from, but that does not bring the order made after the former judgment up for review.

The only alleged errors which can be considered on this appeal are those based on the leave granted to respondent to amend his petition and schedules. But we think the well-settled rule that this Court will not disturb an order granting or denying leave to amend pleadings and other proceedings in civil cases, except where there has been an abuse of discretion, applies to cases of insolvency. (*Bennett* v. *His Creditors*, 22 Cal. 42; *Wilson* v. *His Creditors*, 32 *id.* 406.) And we think with the learned Judge below, "that upon principle and authority the pleadings and proceedings in insolvency may be amended when the Court, in the exercise of a sound discretion, is of the opinion that such amendments should be permitted, and when by granting such permission, the rights of creditors remain unaffected, and *bona fides* on the part of the insolvent is clearly shown."

Judgment affirmed.

I concur: Myrick, J.

I find no error in the record, and therefor concur.

THORNTON, J.

DEPARTMENT No. 1.

[Filed August 31, 1883.]

No. 7699.

McCORD ET AL., APPELLANTS,

v.

OAKLAND QUICKSILVER MINING COMPANY,

RESPONDENT.

TENANTS-IN-COMMON—WASTE—MINE. The excavation and removal of cinnabar from a quicksilver mine, or the cutting of timber trees, used in working the mine, by one tenant, does not constitute *waste* for which his co-tenants may recover treble damages under Section 732 of the Code of Civil Procedure.

ID.—INJUNCTION. Such excavation and cutting and conversion does not constitute waste which should be enjoined.

ID.—ACCOUNTING. *Held*, that this is not an action for an accounting; and conceding that a Court of equity should order an accounting in such a case, the co-tenants applying for such account must allow to defendants all sums expended for the protection of the common property.

Appeal from Superior Court, San Francisco.

Estee & Boalt for appellants.

Garber, Thornton & Bishop for respondent.

McKinstry, J., delivered the opinion of the Court:

The complaint alleges that plaintiffs are and have been owners and tenants-in-common of "The Lost Ledge" mining claim, the plaintiff McCord owning two hundred three-thousandth parts thereof; the plaintiff Griffith, three hundred and sixty-three-thousandth parts thereof; the plaintiff Gibbs, one hundred and thirty-three and one-third three-thousandth parts thereof; the plaintiff Pond, sixty-six and two-thirds three-thousandth parts thereof, and the defendant, 2,240 three-thousandth parts thereof.

That the defendant, "without authority or permission of the plaintiffs, or either of them," has been and is in the exclusive possession and occupancy of the entire premises, and during such occupancy "defendant has ever refused, and still does refuse, to admit the plaintiffs, or either of them, to the possession or occupancy of said premises as tenants-in-common with defendant, or otherwise, and has and still does exclude the plaintiffs, and each of them, from any possession or occupancy of said premises, or any part thereof."

That during the time defendant has been in possession as aforesaid, it has been, and still is, without the consent or permission of either of plaintiffs, actively engaged and employed in mining in and upon said premises, and, with a large number of men and machinery employed for that purpose, has been and still is excavating in and upon the premises, and constructing tunnels and shafts therein, and excavating large quantities of cinnabar therefrom, and cutting down and consuming and destroying growing trees and timber upon said premises, and thereby irreparably injuring and damaging said premises.

That the cinnabar so taken from said premises is of the value of $100,000 and upward.

That a large quantity of the cinnabar so taken from said ground by defendant has been by it reduced and converted into quicksilver, and the quicksilver by it sold and disposed of, and the proceeds converted by the defendant.

That the defendant has hitherto refused, and still refuses to deliver to plaintiffs, or either of them, any part of said cinnabar or quicksilver, or to pay over to them, or either of them, any portion of the proceeds of said sales.

That defendant has been, and still is, engaged in cutting down and destroying the growing trees upon said premises, and converting the same into wood and timber, "which said defendant has been, and still is, using for purposes of fuel and in the construction of shafts, tunnels, machinery and

other structures in and about, carrying on its said business of mining in and upon said premises."

That the value of said trees, wood and timber, so converted by defendant is about $5,000, and that defendant has refused, and still refuses, to pay to the plaintiffs, or either of them, "any part or portion of such value."

That defendant has refused, and still refuses, to give plaintiffs, or either of them, any statement or information in detail, "of the quantity or value of the cinnabar so taken from said ground, or of the quicksilver produced therefrom, or of the amount realized from the aforesaid sales of the same, or of the quantity or value of the trees, wood and timber so taken and converted as aforesaid."

That defendant threatens and intends to continue to prosecute, for its own use and benefit, the business of mining in and upon the premises, and its excavations and diggings of cinnabar, and its reduction of the same into quicksilver, and the sale and conversion of the same, etc., and will so continue unless enjoined. That defendant has no *other* property, etc.

That by reason of the premises plaintiffs have sustained great damage, to wit, in the sum of one hundred and five thousand dollars, or thereabout.

The prayer is: For an injunction, restraining and forever enjoining defendant from prosecuting "the business of mining" in or upon the premises, or from digging, excavating or constructing shafts or tunnels in or upon the same, or from extracting cinnabar or other minerals therefrom, or from cutting down, injuring or destroying any trees or timber upon said premises, or committing waste thereon in any manner; that plaintiffs and each of them be admitted to the occupation and possession of said premises as tenants-in-common with said defendant; that they recover of said defendant "the said sum of $105,000," for their damages, and that said damages "be trebled in pursuance of Section 732 of the Code of Civil Procedure," and for such other and further relief as the nature of the case may require, etc.

The Court below found that the defendant had never claimed the entire mine, and had never excluded the plaintiffs from the common possession, and that plaintiffs had never entered, nor ever intended or desired to enter, into the actual occupation. As the testimony was substantially conflicting, we would not be justified in setting aside these in the other findings.

The material questions presented are:

Does the excavation and removal of cinnabar from a quicksilver mine, or the cutting of timber trees, used in working the mine, by one tenant, constitute *waste* for which his co-tenants may recover treble damages under Section 732 of the Code of Civil Procedure?

Does such excavation and cutting and conversion constitute waste which should be enjoined?

Are the plaintiffs entitled to an accounting?

1. Section 732 reads: "If a guardian, tenant for life or years, joint-tenant or tenant-in-common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be a judgment for treble the damages."

In *Elwell* v. *Burnside* (44 Barb. 447) it was said: "By the common law one tenant-in-common could not be guilty of committing waste; that is, the same acts which, if committed by a tenant for life or years, would constitute waste, would not be waste when committed by a tenant-in-common. He was not liable to his co-tenant in an action for waste, for the injury done to their common estate. As he is now, however, liable by statute (referring to a statute similar to the section of the Code above recited), to respond to his co-tenant, in this form of action, *for those acts which constituted waste when committed by a tenant for life or years*, we must resort to the common law to ascertain whether the acts complained of in this case would be waste, had they been committed by a tenant for life or years."

In the case now before us the quicksilver mine had already been opened when plaintiffs and defendant became tenants-in-common. If, therefore, it be conceded that, under the provision of our Code, tenant-in-common is subject to the action in like circumstances as is tenant for life, or years, the plaintiffs cannot recover damages as for waste. "As to all tenants for life the rule has always been that the working of open mines is not waste." And tenant for life may open new pits or galleries without committing waste. (*Neel* v. *Neel*, 19 Penn. St. 328.) Tenant for *years* is not guilty of waste in taking out ore from the mine, the sole subject of the demise, during his term. That is what he pays rent for.

It may be urged that, as between lessor and lessee for years, their *contract* contemplates the extraction of mineral, and in case of a life estate, the grantor or donor must intend that his grantee or donee shall receive some benefit from his estate. But is it not also true from the very nature of mining property in this State, valuable only because of the mineral it is supposed to contain, each of the co-tenants

may use it in the only way it can be used? The co-tenants may at any time enter into an equal enjoyment of their possession; their neglect to do so may be regarded as an assent to the sole occupation of the other. This is but another application of the principle announced in *Pico* v. *Columbet*, 12 Cal. 414. True, the co-tenants will not be held to assent to the commission of waste by the sole occupant, but the question returns, what acts, done by him, are waste?

It cannot be doubted that, on the part of a mere trespasser, it is a wrong, in the nature of waste, to remove any ore from a mine. The cases cited by appellants fully sustain this proposition. But it is not a just inference that, as between tenants-in-common, the rule is the same. Section 732 of the Code of Civil Procedure does not relate to trespasses committed by those who have no interest in the property. Nor does it define "waste," or declare what acts, committed by a guardian, tenant for life, or years, or joint-tenant, or tenant-in-common—as the case may be—shall be waste. For the appropriate meaning of the word, as applicable to acts done by these several classes of persons, we are relegated to the principles of the common law and to various considerations of policy, arising out of different conditions, which the common law recognizes and approves.

The word "waste" is not an arbitrary term to be applied inflexibly without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged to have committed the wrong. As was said by Roane, J., in *Findlay* v. *Smith*, 6 Mumf. 134, "In considering what is waste in this country, it is to be remarked that the common law, by which it is regulated, adapts itself in this, as in other cases, to the various situations and circumstances of the country. * * * The law on this subject must be applied with reasonable regard to circumstances."

In the mining regions of this State, where title to a lode can be acquired from the United States Government only after work of certain value has been done upon it, can it be, that, if one of several locators or owners shall assume the sole risk of developing the mine, he shall become liable to those who have taken no chance of possible loss, not only for an accounting as to net profits—supposing him to be fortunate enough to secure any—but also, as a *tort-feasor*, for three times the value of the whole or a proportionate share of the ore taken out?

It will be observed, upon the facts herein, no question arises as to unnecessary damage done to the mine, or its works,

by reason of reckless or unskillful management of the business by the tenant conducting it. There may be cases in which the Courts will impose damages for an abuse of his right by a co-tenant in occupation, or interpose to prevent such abuse. But here the theory of plaintiffs is that defendant could not extract ore from the mine without committing waste, because such extraction is a destruction of the very substance of the estate; an irreparable injury to the inheritance.

In view of the character of the property, and of plaintiffs' implied assent to its sole occupation by defendant for mining purposes, we regard the right of the latter to the proceeds of its operations as partaking of the nature of an usufruct; the appropriation of the net returns as a legitimate perception of the profits, and its acts of mining as not impairing or consuming the estate to any greater extent than must be presumed to have been intended to be allowable by each of the parties in interest.

Murray v. *Haverty* (70 Ill. 320), supposing it to have been correctly decided, does not entirely sustain the view of counsel for appellants. That decision was based upon a statute which authorized a tenant to bring *trespass* or *trover* against his co-tenant who should "take away, destroy, lessen in value, or otherwise injure" the common property. The section of our Code does not declare that co-tenant who "shall take away," etc., shall be guilty of waste. The question *waste or no waste* is left to the Courts. Besides, in *Murray* v. *Haverty* the Court had already decided the case by holding certain evidence, as to license, inadmissible under the defendant's plea.

Counsel quote from Freeman on Co-tenancy: "In all cases where a co-tenant practically destroys the estate or some part thereof, trespass may be sustained by the injured co-tenant. (Sec. 302.) But this is to be taken with other portions of the same work where the distinction is pointed out between an appropriation of the proceeds, rents, profits or income, and the destruction of the estate itself. (See, also, Waterman on Trespass, 947.) The tenant-in-common of a mine may occupy it for the purpose contemplated by all, even though a portion of the soil or ore be removed. Each tenant has the right to *use* the mine, and, as was intimated by the Supreme Court of Pennsylvania, so long as an estate is used according to its nature, "it is no valid objection that the use is consumption, and it is no fault of the tenant that it is not more endurable." (*Irwin* v. *Covode*, 24 Penn. St. 162.) The taking of ore from the

mine is rather the use than the destruction of the estate—within the meaning of the general rule. The results of the tenant's labor and capital are in the nature of proceeds, or profits, the partial exhaustion being but the incidental consequence of the use.

It is not necessary to examine in detail the many cases cited by appellants, as in none are the facts like those of the case at bar. We shall refer to a few of them.

Delaney v. *Root* (99 Mass. 546) was an action of *trover* for the conversion of personal property. *Stetson* v. *Delaney* (51 Me. 434) simply decides that, under a statute of Maine, a tenant for life, who neglected to pay taxes assessed upon the estate during his tenancy, and thereby subjected the estate to a sale, was liable to an action by the reversioner, either of *waste*, or of *case* in the nature of waste. *Maddox* v. *Goddard* (15 Me. 219) and *Symonds* v. *Harris* (51 *id.* 14) were actions of trespass *quare clausum* for the destruction of a mill, and for the disseverance and removal of machinery from a mill; *Blanchard* v. *Baker* (8 *id.* 253) trespass on the case for a similar injury to common property; *McDonald* v. *Trafton* (15 *id.* 225) has no bearing upon any question involved in the case before us, and *Hubbard* v. *Hubbard*, *id.* 198, was a statutory action of trespass "for strip and waste" of timber.

As to the destruction of trees charged in the complaint herein, it has been expressly decided in California that, in the enjoyment of his legal rights in the common property, each co-tenant may cut timber, and use or dispose of it, at least to an extent corresponding to his share of the estate. (*Hihn* v. *Peck*, 18 Cal. 640.) In the case before us there is neither averment nor finding that defendant has cut or consumed more than its share. Besides, the use of the trees was merely *incidental* to the mining operations of defendant. In Pennsylvania it is held that the cutting of timber, to be used in a mine by a tenant for life, whose *mining* is not waste, is not itself waste. (*Neel* v. *Neel*, *supra*.) Nowhere is it held to be waste for a tenant-in-common of a farm to cut wood necessary to the use of the farm.

It was, indeed, held in New York by the Supreme Court that the cutting down of timber trees by one of several co-tenants, upon land whose principal value consisted of the growing timber, was waste, for which the other co-tenants could recover damages under a clause of the revised statutes of that State. (*Elwell* v. *Burnside*, *supra*.) But, aside from the rule to the contrary laid down in *Hihn* v. *Peck*, *supra*, plaintiffs have no averment that the quicksilver mine is

"principally valuable" because of the trees growing from its surface.

And here, it may be added, applying the rule of *Hihn* v. *Peck*, it would seem each tenant-in-common of a mine is at least entitled to take out *his share* of the ore. That neither of the tenants can "look into the ground" may be a reason why a Court of equity should order an account to be taken, but ought not to operate a prohibition upon the working of the mine by anybody.

II. Ought the Court below to have enjoined defendant from proceeding with its mining?

"In case of joint-tenants and tenants-in-common, with respect to whose acts of waste the common law has provided no remedy, Courts of equity will interfere when it appears that waste had been committed or threatened by one tenant-in-common who has become possessed of the whole premises." (Taylor's Landlord and Tenant, 694.) This general proposition may be conceded to be correctly stated, but the very question here is, Has waste been committed? At the common law the tenant had no redress for acts of admitted waste committed by his co-tenant. But the latter might be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, which were called "equitable waste," because allowable at law. By our statute, however, a tenant may recover damages of his co-tenant in every case of waste. Holding as we do that the acts of defendant were not, under the circumstances, wanton or destructive, or any waste, it follows plaintiffs were not entitled to an injunction.

Counsel rely upon the opinion of the Court of Chancery of Upper Canada, in *Dougall* v. *Foster* (4 Grant's Ch. 319), where it was held—Esten, V. C., *diss.*—that one tenant-in-common could be restrained at the suit of his co-tenant from digging earth for bricks on the joint property. There the bill alleged that the portion of the lot from which the clay was being excavated and carried away was very valuable for building purposes, and that (with reference to such purposes?) the lot had greatly deteriorated in value by reason of the acts of defendant. In his opposing affidavit defendant did not deny the first of these alleged facts at all, and did not expressly deny the last. The Chancellor said: "It is quite true that this Court refuses to restrict a tenant-in-common from the *legitimate enjoyment* of the estate, because an undivided occupation is of the very essence of that sort of title (C. Lit. 180), and to interfere with the legitimate exercise of that right would be to deny an essential quality of

the title." The Court held that the legitimate enjoyment of a building lot, "within the limits of the town of Bellville," was to build upon it, or improve or occupy it as town property is usually improved and occupied, and that to dig holes in it, or degrade it below the surrounding level, was not such legitimate enjoyment. To repeat the language of Roane, J. (*Findlay* v. *Smith, supra*), "The law on this subject must be applied with reasonable regard to circumstances." If it had appeared in *Dougall* v. *Foster* that the common property was valuable only as a brickyard, and was acquired by the co-tenants for that purpose, the case would have approximated more closely to the one at bar. By the laws of the United States the mining lands are disposed of under laws differing from those through which agricultural lands may be acquired. As a condition to their acquisition by individuals it is requisite that the locators shall have done mining work of a certain value. They are disposed of and acquired for the purpose of mining, and the application of them to that purpose by one tenant-in-common is not *waste* of which the others can complain.

Hawley v. *Clewes* (2 John. Ch. 122) was a bill for *partition* and for cutting down and carrying away timber not wanted for the necessary use of the farm. The injunction was granted, in view of the special character of the case, and the insolvency of defendant, and on the ground that the excessive cutting of timber was destructive, "and not within *the usual and legitimate* exercise of enjoyment." Chancellor Kent added: "The remedy is peculiarly appropriate and proper pending a partition of the very land."

In *Hale* v. *Thomas* (7 Ves. 589), Lord Eldon, after saying: "I never knew of an instance of an application to stay waste by one tenant-in-common against another: one tenant-in-common having the right to enjoy as he pleases," granted an injunction against cutting "saplings or any timber trees or underwood at unseasonable times"—that being destructive. As was said by Esten, V. C., in *Dougall* v. *Foster*, it was *malicious* waste. *Twort* v. *Twort* (16 Ves. 128) was a case where one tenant-in-common was an "occupying tenant" to another. In *Baker* v. *Whiting* the tenant-in-common was the agent of his co-tenants, and the case does not assist the present investigation. (3 Sumner, 485.)

It is said by Eden (Waterman's Eden on Injunctions, Vol. 2, 3d Ed. 210), the instances in which injunctions have been granted between tenants-in-common against committing waste, are few. The application has always been refused, unless attended with peculiar circumstances. In *Smallman*

v. *Onions* (3 Brown's Ch. 510) an injunction was granted against the cutting of timber, on the ground that the parties were only equitable tenants-in-common, the legal title being in a trustee; that therefore the person who was committing the waste had no title to the possession, and cutting the timber was a trespass upon the trustee; also that the trespasser was insolvent. And in *Goodwyn* v. *Spray* (2 Dick's Ch. 667), the Lord Chancellor denied an injunction prayed for by one tenant against his co-tenant cutting timber, saying the only remedy the plaintiff had was to get a partition.

In the absence of allegations, proofs or findings of willful injury, or of unnecessary injury or destruction caused by the negligence of unskillfulness of defendant, the plaintiffs were not entitled to an injunction.

III. Is this an action for an accounting?

It is established in this State that, in ordinary cases, an action at law cannot be maintained by a tenant-in-common against a co-tenant in sole possession of the premises, to recover a share of the profits derived from the estate by means of the labor and money expended by the party in occupation. The occupation by one tenant, so long as he does not exclude his co-tenant, is but the exercise of a legal right. The money he invests at his own risk; if his transactions result in a loss he cannot call upon his co-tenant for contribution, and if they result in a profit his co-tenant is not entitled to share in such profit. (*Pico* v. *Columbet*, 12 Cal. 414.) The demand of the plaintiffs is not for a sum due by way of rent from defendant as the tenant of their interest, nor is it for a proportionable share of an amount received by defendant for the use and occupation of the premises by third persons, nor is an account sought as an incident to a claim for *partition*. It is not for their part of moneys received by defendant which belonged to all the tenants-in-common, nor is it based upon an allegation of any of the exceptional facts mentioned in *Pico* v. *Columbet*, in *Goodenow* v. *Ewer*, or in *Abel* v. *Love*. (16 Cal. 461; 17 *id.* 233. See, also, *Howard* v. *Throckmorton*, 59 Cal. 89.)

Nor is the present an action brought to recover a portion of the profits acquired by the expenditure of defendant's money, treating it as the agent of plaintiffs in developing the common property. There is no pretense of an averment of any actual contract between plaintiffs and defendant, whereby the latter was authorized to act for the former. On the contrary, it is expressly alleged in the complaint, that the acts of defendant were against the will of plaintiffs, and without their consent.

Again: the tenant in occupation is not made the *bailiff* of plaintiffs, in the absence of a contract of agency, by any statute of this State. The statute of *Anne* (4, 5, 16) has never been adopted here, and, if it had been adopted, that statute would seem only to have applied to cases where one tenant-in-common had received from a third person money, or other thing of value, to which both tenants were entitled by reason of their co-tenancy, and retained more than his just share according to the proportion of his interest. (*Pico* v. *Columbet, supra; Henderson* v. *Eason*, 9 Eng. L. and Eq. 337.)

If the appropriation by defendant of the net proceeds of its enterprise be considered as *merely* the legitimate perception of the profits, the action cannot be maintained as an action for an account.

Izard v. *Bodine* (3 Stockton, 403), cited by counsel for appellants, does not sustain their view. There the bill was for partition and account. The Supreme Court of New Jersey held: (1.) If one tenant-in-common *oust* his co-tenant, the latter must first establish his right at law, and thus recover the mesne profits—"for one tenant is bound to account to another only as his bailiff appointed by contract, express or implied." (2.) Where one tenant-in-common "actually receives" the rents, issues and profits, then he may be compelled to account for such profits actually received (from third persons). But, this by statute, both in England and this State, and not by the common law. 4 Anne, C. 16; New Jersey Act of 1794; *Sargent* v. *Parsons*, 12 Mass. 153. (3.) Where one tenant actually occupies the whole estate, without claim on the part of his co-tenants *to be admitted into possession*, he is under no obligations to account—"for he has a right to such occupancy." (Citing, Co. Litt. 200. b, *Sargent* v. *Parsons*, 12 Mass. 152–3; *Meredith* v. *Ambries*, 7 Iredell, 5; *Callum* v. *Mason*, 25 Me. 434.)

Appellants also refer to *Nelson's Heirs* v. *Clay's Heirs* (7 J. J. Marshall, 139.) But in that case the Court, after saying that a statute of Virginia which, like the English statute, authorized "actions of account in favor of one joint-tenant or tenant-in-common against another as his bailiff, for *receiving* more than his just share," was in force in Kentucky, held that the statute did not apply when the estate, at the commencement of the tenancy-in-common, yielded no rent or profit, and one of the tenants entered, and by improving the estate rendered it productive; the other co-tenant having expended neither money nor labor.

In *Shields* v. *Stark* (14 Ga. 436) the Court adjudged that, under the statute of *Anne*, in force in Georgia, a tenant in exclusive occupation was liable to his co-tenant for a proportionate share of the value of the use and occupation; admitting that it had been held in Massachusetts (*Sargent* v. *Parsons*, 12 Mass. 153) that, under the statute of *Anne*, it is necessary to charge the defendant with having received rents and profits "otherwise than by his occupancy." We do not find the language attributed to *Dane* by the learned Court of Georgia (Dane's Abr., Vol. I, Ch. 8, Art. III, p. 170), in our edition of the work referred to. *Shields* v. *Stark* was a bill in equity for a *partition*, and an account.

If it be conceded that the peculiar nature of mining property of itself constitutes such an *equity* as that the tenants, who could at any time have entered into the joint possession, but who never have expended labor or money upon the common property, or become liable for any portion of the loss which might have followed upon the enterprise of their co-tenant, ought to be entitled to demand an accounting from the latter, and to recover a portion of the net profit gained exclusively by its efforts and capital—the present is not an action for such an accounting. The defendant is charged with having irreparably injured the premises by taking therefrom cinnabar of the value of $100,000, and cutting thereon growing trees of the value of $5,000. The plaintiffs aver they have been damaged in the sum of $105,000, and pray, amongst other things, that they may have a judgment for three times that sum. It is alleged that defendant has converted the cinnabar, and the proceeds of sales of it, and the trees, and "has refused to deliver to the plaintiffs any part of the cinnabar taken from said ground or the quicksilver so produced therefrom, or to pay over to them any portion of the proceeds of said sales, and denies to the plaintiffs and each of them any share or interest in the same." But neither this nor any other averment found in the complaint makes the action one for an account, legal or equitable. The averments in the complaint, except in so far as they constitute a declaration in ejectment (and, as we have seen, the Court below found that defendant had never disseized or ousted the plaintiffs), are of facts alleged by plaintiffs to establish *waste*, committed by defendant upon the common property, for which treble damages are asked.

Nevertheless, since the property is described in the complaint, and the exclusive occupation and working of the mine by defendant averred therein, and inasmuch as the

Court below *did in fact* take an account, we have looked into the findings and evidence with respect thereto.

We have said that the net proceeds from the working of the mine were rather in the nature of profits from the use than the result of the destruction of the inheritance. But it may be conceded, for the purposes of this decision, that the relation of the tenants-in-common, under the circumstances disclosed, is *sui generis*, and their rights peculiar. That while the extraction of ore from the mine by one tenant, who does not exclude his co-tenants, is not waste, and the neglect of the latter to enter should be held an assent on their part to the exclusive occupation by the former, yet, because of the effect of the exclusive working by one may be to exhaust the mineral, and the uncertainty of the prospective value of the property may render it impossible to make a just partition of it, a Court of equity should order an accounting; holding that, while it must have been contemplated by the parties that the tenant in occupation should not be held for waste, nor prohibited from proceeding with his work by the co-tenants who do not seek to enter, yet it must also have been contemplated that the tenant in occupation should not appropriate to himself the entire profits. If this be so, however, the co-tenants, not in actual occupation, applying for such account, should at least be required to do equity—to allow to the defendant all sums actually expended for the protection of the common property.

The Court below found: "That defendant has taken from said mine, since the 18th day of March, 1876, a great number of tons of ore, and has taken therefrom a large sum of money, and that all thereof has been expended in the proper, economical, and necessary development and working of said mine for said ore, and in the proper, economical and necessary reduction of the said ores, and in properly, economically and necessarily defending at law the common title to said property, and in proper payment for an outstanding title thereto."

The parties here are not mining partners, between whom an accounting is sought. If they can properly be termed partners "in the profits" (see the *dictum* in *Abel* v. *Love*, *supra*), they have not, by the averments of their complaint, declared themselves partners in any broader sense. By filing their complaint, they did not make themselves liable to the defendant, or to creditors of defendant, in case the account of defendant's transactions should show such transactions had resulted in a loss; they did not make the defendant their agent as to debts by it created beyond the proceeds

from its mining, nor did they subject their interest in the mine to any debts of its creation. In their complaint they impliedly, if not expressly, disavow any such purpose. If the plaintiffs here are entitled to an account, their claim to it is based upon special equities; their appeal to the Court of equity is on the ground that defendant ought, under the peculiar circumstances, to pay them a share of the profits. It would seem plain that an equity is in turn imposed upon them to allow a rebate for expenditures, necessarily incurred in protecting the common possession, and in buying in an outstanding title, paramount to that of the co-tenants, or such as a prudent man would deem it proper to purchase to avoid expensive and dangerous litigation.

IV. Conceding, for the sake of the argument, such an action might have been maintained, the present is not an action to recover rent of defendant as successor to the tenants previously in occupation.

Judgment and order affirmed.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed August 30, 1883.]

No. 8596.

JACKSON *v.* BECKMAN ET AL.

By the COURT:

The questions involved in this case are substantially the same as those ruled on in *Mitchell* v. *Beckman et al.*, No. 8582, and on the authority of that case the judgment and order are affirmed.

Abstracts of Recent Decisions.

CRIMINAL LAW—LARCENY—CONVERSION. Where property is hired with a *bona fide* intention of returning it, according to the contract, a subsequent conversion of the property does not amount to larceny. *Hill* v. *State*, S. C. Wis., April, 1883; 15 Ch. Leg. N. 381.

ATTORNEY AND CLIENT—IMPLICATION OF POWER TO COMPROMISE. An authority to compromise cannot be inferred from the bare relationship of attorney and client. Persons dealing with an attorney-at-law respecting his client's business may justly infer that he has all the powers implied by the relation, but not that he has the powers of a general agent to compromise and release debts, or transfer and convey the goods or lands of his client. *Isaacs* v. *Zugsmith*, S. C. Pa., April 16, 1883; 40 Leg. Int. 335.

EVIDENCE — ALTERED INSTRUMENT — PRESUMPTION. Suit was brought on the official bond of a guardian. The name of A written in the body of the bond and subscribed as one of the sureties, was in both places erased. *Held*, that as the bond was on the files of the Court, the presumption is that it was the bond approved by the Court, and that the alterations were made by the obligors before delivery or presentation for approval. *Zander* v. *Commonwealth*, S. C. Pa., April 2, 1883; 40 Leg. Int. 296; 14 Pittsb. L. J. 21.

CONVEYANCE—SALE OF LAND—STANDING TIMBER—REAL AND PERSONAL PROPERTY. By written contract P. agreed to sell a piece of land to H., and convey when the purchase-money was paid. The standing timber was to remain P.'s as security. H., without paying, cut and sold a part of the timber to J., and P. gave notice of his ownership; thereupon J. bought P.'s interest in the land and timber, prior to any attachment. Before J.'s deed was recorded, the lumber, not having been delivered, was attached by the creditors of H. *Held*, that J. was the owner of the land, and by legal sequence the lumber, and that he could follow it and assert his dominion over it. *Dickerman* v. *Ray*, S. C. Vt., January Term, 1883; Reporters' Advance Sheets.

New Law Publications.

NEW MEXICO REPORTS (Volume 2): Charles H. Gildersleeve, Esq., Reporter. Callaghan & Co., Chicago, Publishers.

FEDERAL REPORTER (Volume 15).

MINING REPORTS: Edited by R. S. Morrison, of the Colorado Bar, and published by Callaghan & Co., Chicago.

We have before noticed the system adopted in these Reports. The cases are reported according to subjects, and these subjects are alphabetically arranged. We know of no better way of writing a text-book. To mining lawyers these Reports are invaluable.

A HAND-BOOK OF PARLIAMENTARY PRACTICE: By Rufus Waples. Callaghan & Co., Chicago, Publishers.

This book is valulable on account of the analysis at the end of each chapter, and also because of its size. The index is very complete and the system very simple. It is a most useful book.

Pacific Coast Law Journal.

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Current Topics.

VALUE IN CLAIM AND DELIVERY.

The Code (Sections 627 and 667 Code of Civil Procedure) provides that, in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or *the value* thereof, in case a delivery cannot be had, and *damages* for the taking and detention; and also that the jury must find the *value* thereof, and assess the damages for the taking and detention. The same rule applies to the defendant, in case the property has been taken by the plaintiff and a return of it to the defendant be adjudged.

When is this value to be ascertained? In *Kelly* v. *McKibben* a judgment had been rendered for a return of the property, or if such return could not be had, then for $699, the value of the property *at the time of the taking*, interest thereon from the time of the taking, and $150, the amount expended by plaintiff in the pursuit thereof.

In 54 Cal. 192 the Supreme Court ordered this judgment to be modified so as to omit the sum of *$150*, and held that the interest could be regarded as "damages for the detention." The Court drew especial attention to the distinction between an action to recover possession of personal property (like this one) and an action to recover damages for the wrongful conversion of personal property, and held that Section 3336 of the Civil Code applied *only* to actions for the recovery of damages for the wrongful conversion of personal property. This section authorizes, as damages for such a wrongful conversion, the value of the property at the time of the taking, with interest from that time, or the highest market value between the conversion and the verdict, with a fair compensation for the time and money properly expended in pursuit of the property. This, being a

rule of damages only, cannot apply to an action for the recovery of the property itself, wherein, if the property cannot be had, judgment goes for the value *and* damages for the detention, because the *value* would be thereby twice included.

In *Kelly* v. *McKibben* the Court said: "If the Legislature intended to provide a rule which should apply only to cases in which a delivery could not be had, it has failed to express that intention. As the provision of the Civil Code (Section 3336) now stands, it applies to actions for the recovery of damages for the wrongful conversion of personal property, and not to actions for the recovery of personal property wrongfully detained." We must, therefore, go back to the common law for a rule in estimating the value in such actions.

The modern action of claim and delivery is based upon the two common-law actions of detinue and replevin.

In the former, the value of the property was estimated at the time of the verdict; in the latter, at the time of suit brought. (4 Minor's Institutes, 349; 2 Wait's A. and D. 538.)

When the property cannot be recovered, this action bears a resemblance to trover. In one you obtain, in lieu of the property, its value *plus* damages, for its detention; in the other, you obtain damages for its wrongful taking and conversion. This has led to much confusion of thought upon this subject.

In *Douglass* v. *Kraft*, 9 Cal. 562, the Court spoke of and adopted the rule of damages in trover. In *Hisher* v. *Carr*, 34 Cal. 645, the Court said: "In case the property is not delivered to the plaintiff, the action bears a strong resemblance to an action of trover."

In *Johnson* v. *Marshall*, 34 Cal. 529, the Court held that in detinue, as in trover, the jury might assess the value at any time between the demand and the trial.

In 3 Sunderland on Damages, 544, the rule is thus laid down: "If, however, the return shows that the property has not been delivered to the plaintiff, the declaration is in the *detinet*, and goes for damages *including* the value of the property. Then the action is like trover or trespass. The measure of damages is the same as in those actions upon the same state of facts."

We do not think this rule practicable. The Code authorizes a judgment for the property, or, if a delivery cannot be had, for its value *and* damages for its detention. In trover the judg-

ment may be for the value at the time of conversion, with interest thereon, or the highest market value between the conversion and verdict, but without interest (Section 3336, *supra*).

If the latter part of the rule were adopted, the "damages for the detention" would have to be omitted, or the judgment would be for more than can be recovered in trover. The better rule is the one adopted in New York, Missouri, and Nevada, viz.: "To estimate the value as at the time of the trial." (38 N. Y. 423; 51 N. Y. 565; 30 Mo. 528; 12 Nev. 423.)

"The value is found, and usually of the date of the trial. * * There is a strong implication that the value should be assessed at the time when such delivery is adjudged in favor of the prevailing party. It is consonant to legal analogies to fix the value at the time when delivery is required to be made, rather than at any other time." (3 Sunderland on Damages, 542, 545; 4 Minor's Institutes, 349; 2 Wait's A. and D. 538.)

In addition to this value, the plaintiff is entitled to damages for its detention. Ordinarily, interest on the value from the time of the wrongful taking would be a proper measure, unless the property has depreciated in value, in which case the depreciation must be added to the interest on the value. (*Allen* v. *Fox*, 51 N. Y. 565; 3 Sunderland on Damages, 545, 546.)

The same result is reached by assessing the value at the time of the wrongful taking, and adding thereto interest thereon, and the amount of appreciation in value, if there has been any, since the taking. (24 Minn. 31; 3 Sunderland on Damages, 546.) The law aims to compensate for the entire injury.

"SUING THE STATE."

[From a Paper read before the Kentucky State Bar Association.]

BY GEO. M. DAVIE, ESQ.

[*Concluded from No.* 1 *P. C. L. J.*]

First—It is inconsistent with the idea of sovereignty and beneath its dignity to have the State sued in any Court, especially at the suit of an individual.

Second—That to allow the State to be sued and the money in its treasury to be subjected by the Court to the payment of those it owes, or to indemnify those it has injured, might hamper or

prevent the proper performance of the public duties of the State or its officers in times of peace, or might endanger the public safety in times of war.

As to the first reason, it has already been shown that the use of the word "sovereign," as applied to our Commonwealth and officers, in this connection, is confusing and misleading. The citizen is the "sovereign" if there be any here, and the State his mere creature. If the free citizen can be sued, surely his agency, the State, or his servants, its officers, can be, without any sacrifice of dignity. It cannot be inconsistent with the idea of a Republican Government, founded on the demand for justice to the citizen, to permit that citizen to sue it, in its impartial Courts, for his rights. And there seems to be a much greater loss of dignity when the State repudiates an honest debt or indulges in a legislative squabble over a citizen's bill than for it to defend in a calm judicial proceeding.

It has never been thought inconsistent with the idea of sovereignty, or of dignity, for the State to come in and file and fight the thousands of suits that it brings *against* its citizens, or for it to appear as a defendant in error when the citizen appeals to the higher Court. And when, now and then, particularly favored persons secure permission to sue the State by special Acts, there has been no appreciable lessening of its dignity. (See *Stevens* v. *Com.*, 3 Ky. Law Reporter, 165.) The dignity of the United States has not been impaired by the passage of the Act establishing a Court of Claims; nor has the dignity of any State suffered which has granted to its citizens the reciprocal right to sue it as it sues them.

Republics and commonwealths are supported, not for their own abstract grandeur or royal dignity, but to "establish justice" and "to secure to all citizens the enjoyment of their rights."

"A State," said the Supreme Court through Judge Wilson in 1793, "is a body of free persons united together for the common benefit, to enjoy peaceably what is their own and to do justice to others." "Is there," he continued, "any part of this description which intimates in the remotest manner that a State, any more than the men who compose it, ought not to do justice and fulfill engagements? A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, willfully refuses to discharge it. The merchant is amenable to a Court of justice.

Upon general principles of right, shall the State, when summoned to answer the fair demands of its creditors, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice by declaring, 'I am a sovereign State'? Surely not. Before a claim so contrary in its first appearance to the general principles of right and equality be sustained by a just and impartial tribunal, the person, natural or artificial, entitled to make such claim should certainly be well known and authenticated." (*Chisholm* v. *Georgia*, 2 Dallas.) In 1879 that same tribunal, speaking through Mr. Justice Samuel F. Miller, one of the greatest and most fearless minds that Kentucky has furnished to the nation, in answer to the argument "that the maxim of the English Constitutional law, that the King can do no wrong, is one in which the Courts must apply to the Government of the United States," said:

"It is not easy to see how the proposition can have any place in our system of government. We have no King to whom it can be applied. We do not understand that, either in reference to the Government of the United States or of any of their officers, the English maxim has any existence in this country." (*Langford* v. *United States*, 101 United States, 343.) The same great Judge, speaking for the same tribunal, in the Arlington Cases, 106 United States, page 206, said:

"What are the reasons which forbid that the King should be sued in his own Court, and how do they apply to the political body corporate which we call the United States of America? As regards the King, one of the reasons given by the old Judges was the absurdity of the King sending a writ to himself to command the King to appear in the King's Court. No such reason exists in our Government, as the process runs in the name of the President, and may be served on the Attorney-General. Nor can it be said that the Government is degraded by appearing as a defendant in the Courts of its own creation, for it is constantly appearing as a party in such Courts and submitting its rights as against the citizen to their judgment. * * * As no person in this Government exercises supreme executive power or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption of liability from suit rests. * * * No man in this country is so high that he is above the law. No officer of the law may set that law

at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon the rights in controversy between them and the Government; and the docket of this Court is crowded with controversies of the latter class." (*U. S.* v. *Lee*, 106 U. S. 220.)

The second reason offered in support of the rule is one of the numerous instances in which the Courts, unable to give any more definite cause for their action, lodge it, in vague terms, upon "public policy."

This reasoning, also, has been met and fully answered in the Supreme Court, in the Arlington Cases. (106 U. S. 217.)

"In this connection," says Justice Miller, "many cases of imaginary evils have been suggested, if the contrary doctrine should prevail. Among these are a supposed seizure of vessels of war, and invasion of arsenals and forts of the United States. Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of the Government; and, if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail. * * * Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen except in the protection of the judicial tribunals. * * * The evils supposed to grow out of the possible interference of judicial action, with the exercise of the powers of the Government essential to some of its most important operations, will be seen to be small indeed when compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations. * * * The slightest consideration of the nature, the character, the organization and the powers of the Courts will dispel any fear of any injury to the Government at their hands. While, by the Constitution, the Judicial Department is recognized as one of the

three great branches among which all the powers and functions of the Government are distributed, it is inherently the weakest of them all. Dependent as the Courts are for the enforcement of their judgments upon officers appointed by the Executive, and removable at pleasure, with no patronage and no control of purse or sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of their rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives. From such a tribunal no well-founded fear can be entertained of injustice to the Government, or purpose to obstruct or diminish its just authority."

If the claim is passed on by the Legislature, it is none the less to be paid by taking money from the Treasury, the only difference being that the draft is apt to be larger than when the claim is sifted by a Court.

In Kentucky the rule was adopted apparently without any independent consideration, on the theory that if the State was allowed to be sued "the mails might be stopped, the sinews of war might be cut, and an army left destitute." (*Divine* v. *Harvie*, 7 Mon. 445.)

Indeed the rule was carried still further, and it was held that the State cannot even be made a garnishee, for fear of the "mortifying circumstance of a member of the Legislature rendered unable to pay his sustenance while attending its session," because of the garnishment of his salary for an honest debt. (*Divine* v. *Harvie, supra.*) But Judge Owsley dissented, and declared that it was opposed to morals and justice, saying:

"After the debt is payable, it cannot be important to the interests of the Government whether the money is paid over to the person with whom it was contracted or any other. Though the payment be made to another, the wheels of government will move on as before, without the apprehension of danger to the Post-office Department, or fears that the Legislature may be disturbed in their official deliberations." And in *Rodman* v. *Musselman*, 12 Bush, 357, the idea of there being any "public policy" in encouraging insolvent and dishonest officials by helping them to evade the payment of their injured creditors, is

scouted, and the Court says that the rule has rather the opposite effect of resulting in "a denial of credit to them, and consequently more injury than benefit."

As far back as 1832 the Constitution of Mississippi provided that the Legislature "shall direct in what manner and in what Courts suit may be brought against the State." The Mississippi Legislature, in 1833, passed an Act providing that "It shall be competent for any person or persons deeming him or her or themselves, or body politic or corporation, to have a just claim against the State of Mississippi, to exhibit and file a bill in equity against the State."

That Act remained in force until about the time of the war, and it was not only not productive of any injurious consequences, but it proved so beneficial that it was readopted as a permanent provision of the Code in 1871. (*Whitney* v. *State*, 52 Miss.)

In 1855 the United States established the Court of Claims, with jurisdiction to decide controversies against the Government arising on contracts. No hinderance or disaster to the public service has followed, nor were "the sinews of war cut" by it, even during the great civil conflict. But it has proved such a benefit that the most thoughtful minds are anxious to so enlarge its jurisdiction as to relieve Congress entirely from the burdens and temptations of sitting upon private claims.

Counties, cities and towns are governments, and some of them—like New York city—larger than some of the States; yet they have always been sued, and no disastrous consequences have occurred by sending their creditors to the Courts instead of to their Common Councils. If New York city or Philadelphia can be sued, there can be no reason why Rhode Island or Delaware may not be.

A thoughtful consideration will show that the transferring of such controversies from the lobby to the Courts will not only not injure the State, but will save it from many losses; will benefit the public service; will take away from the Legislature the most distracting, absorbing and contaminating influences with which it is now beset, and will enable it to turn its whole attention to the more appropriate and seemly duty of pure legislation. That the State and the citizen will each be far more apt to obtain

accurate justice before the Courts than before the legislative committees, no one can doubt for an instant.

A truth so important and so easy of demonstration as this cannot always be ignored, and we already begin to find significant evidences of its recognition. Allusion has already been made to the powerful utterances of the Supreme Court on the subject; and while that tribunal is fettered by unfortunate precedents that it has not yet been wholly able to overcome, yet it has reduced the evil as far as possible by holding that, "where the State is concerned, the State should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the Court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.

"In deciding who are parties to the suit, the Court will not look beyond the record; and making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest." (*U. S.* v. *Lee*, 106 U. S. 215.)

Allusion has also been made to the steps taken in this direction by the establishment of the United States Court of Claims; and to the complete rejection of the old rule by the State of Mississippi as far back as 1833. (*Farish* v. *State*, 4 Howard, Miss. 170.) Indeed the United States has gone further, and provided that any foreign subject may sue the United States, provided that his nation offers a reciprocal right of suit to citizens of the United States.

Even in England, the demand for justice, and the weariness of monarchical absurdities, has had its effect; and, during the present generation, the old "petition of right" has ripened into what is practically a right to sue the Crown. One who now asserts a debt against the British Government has but to file a petition of right before the British Secretary of State, setting out his case, and asking leave to sue, and thereupon "it is the duty of the Queen to grant it, and the right of the subject to demand it." And the controversy then proceeds in Court against the Government, as if against an individual. (*United States* v. *O'Keefe*, 11 Wallace, 184; *United States* v. *Lee*, 106 United States, 238.)

In Kentucky, as we have seen, the first two Constitutions ordered that "The Federal Assembly shall direct by law in

what manner and in what Courts suits may be brought against the Commonwealth;" and the present Constitution provides that the Legislature "may" so direct. (Art. 8, Sec. 6.)

It is perhaps worthy of consideration, then, whether the interests of the State, as well as its duty to its citizens, do not require that this constitutional provision be executed, and the Courts of justice be given jurisdiction of suits against the State, as they have long had of suits by the State.

A statute similar to the Mississippi statute, giving jurisdiction to the Circuit Courts of equity or common law, with the ordinary appellate rights, would carry out this constitutional intent. And it is believed that the effect would be to insure justice, to purify the Legislature, and to save large sums of money to the State.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed August 15, 1883.]

No. 8867.

PHELAN, RESPONDENT, *v.* TYLER ET AL., APPELLANTS.

JUDGMENT—APPEAL—DEATH—JURISDICTION—PARTY. After an appeal was regularly taken and before the transcript was filed in the Supreme Court, one of the appellants died. The cause was subsequently argued, submitted, and judgment rendered by the Supreme Court, without suggestion of death or substitution of representative. *Held*, such judgment of the Supreme Court was not *void* for want of jurisdiction.

ID.—PATENT—ESTOPPEL. The judgment in the former action is no less a bar by reason of its being rendered before a patent for the land had been issued. Both parties then claimed, and now claim, under the patentee, and their conflicting claims were in no way affected by the issuance of the patent. The question to be determined in the former action, as in the present one, is the same, viz.: Which party acquired the patentee's interest in the land? (*Byers* v. *Neal*, 43 Cal. 210.)

Appeal from Superior Court, Los Angeles County.

Thom & Stephens for respondent.

Bicknell & White, *S. Haley* and *H. K. S. O'Melveny* for appellants.

SHARPSTEIN, J., delivered the opinion of the Court:

The defendants are the legal representatives of William Standifer and John Dunlap, deceased, and the Court finds

"that said William Standifer and John Dunlap in 1873 commenced an action of ejectment against Thomas Phelan for the recovery of the possession of the land described in said answer, to wit: the two small tracts comprising about twenty-one acres of defendants' herein, and that such proceedings were afterward had in said action, and upon the trial thereof, that a judgment was entered by the District Court in this county, wherein the same was pending, and in favor of the defendants in that action, for costs, in March, 1875. And that afterward, on the 10th day of June, 1875, said Standifer and John Dunlap took an appeal to the Supreme Court of the State, but did not perfect said appeal by filing the transcript in said Court until July 14, 1875, before which last date, viz., on the 7th day of July, 1875, the said John Dunlap had departed this life; that no suggestion of the death of said John Dunlap was ever made, and no person or legal representative of said deceased was ever substituted in said Supreme Court for said John Dunlap, deceased; but without any such suggestion or substitution the cause was argued and submitted to the Supreme Court for final determination on the 19th day of October, 1875, and thereupon, then and there, said Supreme Court rendered its judgment from the Bench of reversal of the judgment of said District Court, and remanded same, with directions to said District Court to enter judgment for the plaintiff in that action on the findings, and on the 30th day of November, 1875, issued its remittitur to said District Court." From which the Court reached the conclusion "That the Supreme Court, at the time the decision and judgment of that Court was rendered * * * had no jurisdiction, and that said judgment was void."

If the death of John Dunlap, occurring at the time it did, operated as an ouster of the jurisdiction of the Supreme Court of the case, the conclusion at which the Court arrived is doubtless correct. But the death of a party pending an appeal does not have that effect in any case. "An action or proceeding does not abate by the death or disability of a party * * * if the cause of action survive or continue. In case of the death or any disability of a party, the Court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest." (C. C. P. 335.)

There is nothing in the Code which would justify the inference that the death of a party, pending an appeal, ousts the jurisdiction of the Supreme Court and renders its judgment void, unless, before the rendition thereof, a representa-

tive of said deceased party be substituted in his stead. This question was not directly involved in *Ewald* v. *Corbett*, 32 Cal. 493, or in *McCreary* v. *Everding*, 44 *id.* 284, although there are expressions in both which militate against the views which we entertain on the subject, and which seem to us to be supported by a preponderance of the authorities. The reason why, "in such cases, the judgment is simply erroneous, but not void * * * is because the Court, having obtained jurisdiction over the party in his life-time, is thereby empowered to proceed with the action to final judgment; and while the Court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error *coram nobis* if the fact must be shown *aliunde*." (Freeman on Judgments, 153.)

As we view it, the judgment in the former action is no less a bar by reason of its being rendered before a patent for the land had been issued. Both parties then claimed, and now claim, under Pico, and their conflicting claims were in no way affected by the issuance of the patent. The question to be determined in the former action, as in the present one, is the same—that is, which party acquired Pico's interest in the land? Such being the case, the former adjudication, in our opinion, constituted a bar to the present action. (*Byers* v. *Neal*, 43 Cal. 210.)

Judgment reversed, with directions to the Court below to enter a judgment in favor of the defendants upon the findings.

We concur: Thornton, J., Myrick, J.

DEPARTMENT No. 1.

[Filed August 28, 1883.]

No. 8647.

CURTIS AND CLUNIE, APPELLANTS,

v.

CITY OF SACRAMENTO, RESPONDENT.

ARBITRATION—AWARD—NOTICE. An award, made *ex parte*, and without notice to the parties of the time and place for hearing the allegations and evidence, is invalid and void.

Appeal from Superior Court, Sacramento County.

Freeman & Bates for appellants.

Catlin & Hamburger and *W. A. Anderson* for respondent.

MCKEE, J., delivered the opinion of the Court:

The plaintiff sued upon an award made in pursuance of an instrument in writing, purporting to have been made on the 29th of July, 1878, "by and between the plaintiffs and the Board of Trustees of the city of Sacramento, representing and acting for said city." Pursuant to the terms of the instrument the question of the value of some professional services which had been rendered by the plaintiffs for the city of Sacramento, was referred to two arbitrators—one to be selected by the plaintiffs and the other by the Board of Trustees—who were to meet as soon as convenient, and after hearing such statements as would be made on behalf of either party, were to determine and report in writing to each of the parties; but in case of a disagreement, power was given them to select a third arbitrator; and it was stipulated that the award of any two of the three arbitrators would be regarded as the award of all, and entered as a judgment against the city, after being allowed by the Board of Trustees.

Two persons were selected pursuant to the terms of the submission; and the Court found that, soon after the selection, they had a meeting, at which they received the unsworn statements of those who were present to testify. The plaintiffs were present at the meeting, but the Mayor of the city was not present; and no notice of the meeting was given to or served upon him, neither by the arbitrators nor by the plaintiffs, and he had no opportunity to be present. Two of the trustees were present as witnesses, one of whom withdrew after making his unsworn statement to the arbitrators. The arbitrators were unable to agree, and they selected a third person, who, upon being notified, accepted the appointment; and the three arbitrators were then sworn and qualified according to law. But they gave no notice to the defendant of a hearing, or of a meeting to be held for hearing the parties and their witnesses, nor did they take any testimony. The original arbitrators handed to the third arbitrator a transcript in long-hand of the phonographic reporter's notes of the statements made to them. Upon that transcript the third arbitrator *ex parte* took the unsworn opinions of professional men, and those opinions and the transcript of the statements made to the original arbitrators formed the basis upon which the arbitrators made their award.

The Court held that the award was invalid and void for want of notice to the defendant of the time and place of hearing the cause.

It is contended that the decision is erroneous because, as the award was a judgment rendered by a tribunal of the parties' selection, having jurisdiction of the subject-matter submitted to it, and of the parties by whom the submission was made, the want of notice of the time and place of meeting for the hearing and determination of the matter submitted does not invalidate the award, and constitutes no defense to an action at law upon it. But the validity of an award does depend not only upon the due and proper appointment of the arbitrators, but upon the regularity of their proceedings (*Crowell* v. *Davis*, 12 Met. 296), and we think if their proceedings are had *ex parte*, and without notice to the parties of a hearing, their award is invalid and void. That, it is contended, is contrary to the English rule which makes an award conclusive at law. We do not understand that such a rule prevails in the English Courts. It is true that in *Tiltenson* v. *Pete* (3 Atk. 529), which was decided in 1747, where the defendant pleaded an award, and objection was made that the arbitrators did not give sufficient notice of the time they intended to meet, or of the particular place at which they were to meet, Chancellor Hardwick overruled the objection as immaterial, saying that "the arbitrators were not bound to give notice; and that the only ground to impeach an award is collusion or gross misbehavior in the arbitrators, for, otherwise, being made the Judges of the parties' own choosing, it is final and binding upon all the parties." But that seemed to the Courts most unreasonable; and in *Paschuli* v. *Terry* (Kelynge, 132), decided in 1760, the Court of King's Bench set aside an award which had been made without notice given to one of the parties of the appointment of an umpire, or of a hearing, upon the grounds that it was repugnant to the submission; and that it was unreasonable and contrary to natural justice to make an award without giving notice to the parties to attend. "The umpirage," said the Court, "was made upon the defendant's evidence alone, *parte altera inaudita;* the plaintiff was neither heard nor had any opportutnity given him to be heard." The principle of that decision, viz., that every man ought to have an opportunity to be heard in defense of his rights, has been ever since acted upon by the English and American Courts; and it runs through all the cases in the books. (*Whatley* v. *Morland*, 2 Dowling's P. C. 249; 4 Tyrwhitt's Exchequer Rep. 245; *Salkeld* v. *Slater*, 12 Add. & Ell. 767;

Edherstoner v. *Cooper*, 9 Ves. Jr. 67; Russell on Arb. 165; Morse on Arb. 116 and 118; *West Jersey R. R.* v. *Thomas*, 6 C. E. Green, 205.)

In *Falcover* v. *Montgomery*, 4 Dallas, 232, where an umpire had, without hearing the parties in person, decided the case upon the facts as stated to him by the original referees, the Supreme Court of Pennsylvania said: "The plainest dictates of natural justice must prescribe to every tribunal the law that no man shall be condemned unheard;" and Justice Story, in *Lutz* v. *Linthicum* (8 Peters, 178), said: "Without question due notice should be given to the parties of the time and place of hearing the cause, and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside." See also *Rigden* v. *Martin*, 6 Harr. & J. 403; *Passmore* v. *Petit*, 4 Dall. 271; *Walker* v. *Walker*, 28 Geo. 104; *McKinney* v. *Page*, 32 Maine, 13; *Maynard* v. *Frederick*, 7 Cush. 247; *Crowell* v. *Davis*, *supra*; *Conrad* v. *M. Ins. Co.*, 4 Allen, 20; *Frissel* v. *Fickes*, 27 Mo. 557; *Day* v. *Hammond*, 57 N. Y. 479.

It is true, as has been urged, that an award is the judgment of the tribunal selected by the parties to the submission; but greater effect cannot be given to it than is given by law to the judgment of an inferior Court. As an inferior tribunal the authority of the arbitrators was limited by the agreement of submission; and the agreement cannot be interpreted to authorize plaintiffs to institute an *ex-parte* hearing before the arbitrators. The right to notice of a time and place for a hearing upon the matter submitted was implied in the agreement to submit, unless it was expressly waived by the terms of the submission. (*Peters* v. *Newkirk*, 6 Cow. 103; *Paschall's Case*, *supra*.)

To take away a man's property, or his rights in property, without a hearing, trial or judgment, or opportunity of making known his rights therein, is violative of that section of the bill of rights which declares that "no person shall be deprived of life, liberty or property without due process of law." An award made *ex parte* and without the appointment of a time and place for hearing the allegations and evidence of the parties is therefore invalid and void; and in an action at law upon such an award the want of notice may be pleaded as a defense at law. "It is," says Chancellor Walworth, "purely a legal question, upon the ground that it was not within the authority of the arbitrators to make any award without notice." (*Elmdorf* v. *Harris*, 23 Wend. 628.)

Judgment and order affirmed.

We concur: Ross, J., McKinstry, J.

It appears that at the hearing of the evidence the defendant offered to prove that the opening of the road would divide his farm in such a way as to make it necessary for him to fence his remaining land. To this the plaintiff objected; the objection was sustained by the Court upon the ground that the cost of fencing was not an element of damage, and that ruling is assigned as error.

It is contended that the ruling was correct, because the cost of fencing is excluded by law, as an element of damage, in all condemnation proceedings, except where a railroad company seeks to condemn land for the purpose of its railroad. In such a proceeding the Court is required "to ascertain and assess the cost of good and sufficient fences along the lines of the railroad, and of cattle-guards where fences may cross the line of the road" (Section 1248, Subdivision 4, *supra*); but it is not required to do so in any other case; and, therefore, it is insisted the defendant was not entitled to prove the necessity or the cost for fencing his land.

But this provision as to railroad companies does not affect the right of the owner to the compensation to which he is entitled. The object of the provision was to secure the performance of a duty imposed by law upon railroad companies on land taken for the purpose of their roads. (Sec. 485 C. C.) That duty the State enforces by a special assessment in the condemnation proceedings; and the duty must be performed either by the railroad company or the land-owner. The assessment may be paid to the land-owner by the company, or it may elect to give bond in double the amount of the assessment, for the building of such fences and cattle-guards as may be needed upon the land taken for the road within eighteen months after the railroad is built on the land. (Sec. 1251 C. C. P.) If the company fails to build, the land-owner may sue upon the bond. But if payment of the assessment be made to the land-owner, and he fails to build and maintain such fences, etc., the law makes him liable to the company for any injuries which may be sustained by reason of his animals running at large upon the railroad, and relieves and exonerates the company from any damage or loss arising out of the killing or maiming of his cattle, trespassing upon the road, unless it be proved that the loss or damage was caused wholly by the fault or negligence of the company. (Sec. 485 C. C.) The special assessment in a railroad case is therefore made in the line of a duty imposed by law, and not in the way of damages to the land-owner for an injury to his land.

But in the present proceeding there can be no assessment against the plaintiff for the enforcement of a legal duty; for the county of Butte is not bound to fence public or private roads. Any assessment made in the proceeding must therefore be made to the defendant in the way of damages for an injury; and there is no law known to us which excludes a defendant in a case from the right of showing by legal testimony the extent of an injury which is the subject for ascertainment and assessment.

All the provisions of the law under consideration must be read and construed so as to correspond with Section 14, Article I, of the Constitution, which provides that "private property shall not be taken, or damaged, for public use, without compensation having been made or paid into Court for the owner." That constitutional provision is broad enough to include all cases in which private property is attempted to be taken under the power of eminent domain. And the Legislature, in carrying out the provision, has established the rule that where you take all a man's property for the public use, you must pay him its value; but where only a part of it is taken, you must pay the value of that part and the damages, less benefits, for the injury which the taking and appropriation of the part may cause to his remaining land. Injury to what remains is therefore a proper subject of compensation. The right of ownership is unlimited except by the right of the State as regulated by the Constitution and laws; and when the State exercises its right, the owner has the legal right to prove by legal testimony any of the acts or things which may constitute injury to what remains of his land by the act of appropriation.

It is argued that the cost of fencing cannot be considered as an element of such injury, because the plaintiff has what is called a "No Fence Law" (Stats. 1873–74, p. 310); and therefore neither plaintiff nor defendant is bound to fence. But under such a statute, as at the common law, while no man was bound to fence his lands against the cattle of another, there may be a necessity for fencing-in his own cattle, or otherwise protecting his land (*Rust* v. *Low*, 6 Mass. 94); and if the act of taking from him part of his land for the public use forces upon him the necessity of protecting what remains, he should be entitled to show it. You cannot take a man's land for a public highway, to run in such a way as to expose his remaining land to unlawful or other encroachments, and arbitrarily say to him, There is no necessity

for protecting your land by fences or otherwise. In the language of the Supreme Court of Illinois, "The injuries which the proprietor suffers by having his farm divided so as to make it inconvenient to pass to and from its different parts and to compel him to erect additional fences, and all injuries of a like character occasioned by the construction of a public work through it, are as proper subjects of inquiry in estimating the damages sustained thereby, as is the value of the land actually appropriated to public use." (*Alton R. R. Co.* v. *Carpaiter*, 14 Ill. 192.) "What the public take," says the Supreme Court of New Hampshire, "is not simply the land covered by the road, but the right to make and maintain the road, and the injury to the whole tract may much exceed the value of the land actually taken. The land may be inconveniently divided, and additional fencing may be required. A just and fair compensation for the right taken would be the actual damage done to the whole land, and such is the compensation which in equity the land-owner ought to receive." (Mt. Wash. R. Co. 35 N. H. 134.) So where a committee had been appointed under a statute of Massachusetts to locate a road adjudged to be necessary, and to estimate the damages any person may sustain in his property by the laying-out of the road, it was held that in estimating the damages the committee were not confined to the value of the land covered by the road and the expense of fencing the ground, etc., but the owner was entitled to show any other actual damage, and the estimation ought to be according to the damage which he will in fact sustain in his property by the opening of the road. (*Comm.* v. *Coombs*, 2 Mass. 489; Cooley's Con. Lim. 566; *Moulton* v. *Scott*, 1 Penn. S. C. 563.)

Taking part of a man's land for public use may not, in fact, force upon him the necessity to fence the remainder of his ground; but he has the legal right to show that such a necessity will arise out of the appropriation, and if the necessity shall be proved as a fact, the expense incident to it is a matter for the Court in estimating the damage to which the owner is entitled. The Court erred in excluding the evidence.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Ross, J., Sharpstein, J., McKinstry, J., Myrick, J., Thornton, J.

DEPARTMENT No. 2.

[Filed August 16, 1883.]

No. 8917.

FLINT, RESPONDENT, *v.* CADENASSO ET AL., APPELLANTS.

CONTRACT—AGREEMENT—PARTY—ACTION. While defendants did not make the agreement in question with plaintiff's assignor, yet their agreement was for his benefit, and, upon their failure to perform, he had a right of action against them.

Appeal from Superior Court, Yolo County.

G. S. Harding and *R. Clark* for respondent.
J. C. Ball and *J. Craig* for appellants.

MYRICK, J., delivered the opinion of the Court:

The facts of this case, as presented by the complaint, and as found by the Court, may be briefly stated thus: Joel Wood, being the owner of a tract of land, and being indebted to Flint (the plaintiff), executed his promissory note, and a mortgage upon the land to secure the payment thereof. Subsequently, Joel Wood conveyed the premises to Albert Wood, by deed expressing a money consideration, while the consideration, in fact, was an agreement that Albert Wood should pay for Joel Wood the amount of the note and mortgage. Thereafter, Albert Wood conveyed to the defendants, by deed also expressing a money consideration, while, in fact, a part of the consideration was the agreement of the defendants to pay to said Flint for said Joel Wood the amount due and to become due and unpaid from said Joel Wood to said Flint, as secured by the mortgage above mentioned. The note being unpaid, plaintiff brought suit thereon against Joel Wood, and recovered judgment, which judgment he (Joel Wood) paid. Joel Wood then assigned to plaintiff his right of action against defendants to recover the amount so paid by him, and this suit is brought by plaintiff, assignee of Joel Wood, to recover of the defendants the said amount.

We have no doubt of the liability of the defendants on their agreement; it is true, they made no agreement to and with Joel Wood, but their agreement was for his benefit, and, upon their failure to perform, he had a right of action against them. We think the complaint properly states a cause of action. Whether or not the agreement was made, as alleged, was a question of fact, upon which the evidence was conflicting, and the Court found in favor of plaintiff.

Judgment and order affirmed.

We concur: Thornton, J., Sharpstein, J.

IN BANK.

[Filed August 22, 1883.]

No. 8925.

THE PEOPLE EX REL. HENRY STODDARD, APPELLANT.

v.

A. B. WILLIAMS, RESPONDENT.

CENSUS—CLASSIFICATION OF COUNTIES. The census referred to in Section 4007 of the Political Code, by which the counties are classified, is the United States Census.

EVIDENCE—CERTIFICATE OF SUPERINTENDENT OF U. S. CENSUS. The certificate of the Superintendent of the United States Census is admissible to show the census returns.

EVIDENCE—JUDICIAL NOTICE. The trial Court and the appellate Court will take judicial notice of census results.

OFFICE—CONSOLIDATION—PUBLICATION. To effect a consolidation of county offices, the order passed by the Board of Supervisors for such purpose, must be published *by order of the Board*.

J. T. Richards and *Attorney-General* for respondent.
W. C. Stratton for appellant.

THORNTON, J., delivered the opinion of the Court:

This is an action for alleged usurpation of the office of Recorder of Santa Barbara County by defendant Williams. The relator was elected Recorder of Santa Barbara County at the election in 1882, and defendant was elected at the same time County Clerk of said county. Defendant claims by virtue of his election as County Clerk to be *ex-officio* Recorder.

By Section 4006 of the Political Code, the counties of this State, for purposes other than for roads and highways, are classified as follows:

1. Those containing twenty thousand inhabitants or over, constitute the first class;

2. Those containing eight thousand inhabitants, and under twenty thousand, are the second class; and,

3. Those containing less than eight thousand inhabitants constitute the third class.

By section 4607 of same Code, "Whenever a new census is taken, the counties on the first day of July next thereafter are, by operation of law, classified under such census." Each county must have a Board of Supervisors, consisting of seven members in counties of the first class, of five members in those of the second class, and of three in those of the third class. (*Id.* 4022.)

Under the provisions of Section 4025 Political Code, whenever, under the classification above stated, the number of Supervisors of any county is either increased or diminished, the Board of Supervisors must redistrict the county into Supervisor districts to correspond with the number of Supervisors to which it is, under the new classification, entitled. When the number is increased, at the first general election thereafter Supervisors must be elected for such new districts in which no Supervisors then acting reside.

The foregoing sections of the Code heretofore referred to, as well as those hereinafter referred to, were in force when the events occurred out of which the controversy in this case arose.

Prior to the first day of July, 1881, the county of Santa Barbara was, by operation of law, a county of the second class, and on the 11th day of August, 1882, the Board of Supervisors thereof passed an order redistricting the Supervisor districts, so as to form five such districts, upon the ground that it had become by an increase of population a county of the second class, and thus entitled to have five members in its Board of Supervisors. In making this order, the Board acted upon the census taken in 1880 by the authorities of the United States, under the provisions of the Act of Congress of March 3, 1879, entitled "An Act to provide for taking the tenth and subsequent censuses." The census (the 10th) was to be taken on or before the date of June 1st, 1880. (Section 1st Section of Act, 20 Stats. at Large, 473.)

The enumeration to be made under the Act of Congress was to commence on the first Monday of June, 1880, and be made by enumerators appointed under the Act, and it was required of each enumerator to complete the enumeration of his district, and to prepare the returns required by the Act to be made, and to forward the same to the Supervisor of his district on or before the 1st day of July, 1880; and in any city having over ten thousand inhabitants under the census of 1870, the enumeration of population was to be taken within two weeks from the first Monday of June. (Section 10 of Act.) The expenses of the enumerators were to be sent to the Supervisors of the Census, who were to scrutinize the returns to see whether they were taken in compliance with law, and to forward the completed returns to the Superintendent of the Census at Washington city. (Sections 5, 2 and 3.) By the census it appeared from a certificate of the Superintendent of the Census, which was offered in evidence on the trial, the population of Santa Barbara

County was on the 1st day of June, 1880, *nine* thousand five hundred and thirteen (9,513), sufficient to raise it to a second class of county.

It is argued that the census referred to in Section 4007 Pol. C., above quoted, is not the census of the United States. But in this contention the counsel for appellant has gone astray. We think it clear the reference is to such census. The census of the United States is a census of each pacticular State as well as of all the States. The enumeration taken under the Act will show the inhabitants of each political division of the State (Sec. 11). In ordinary parlance, when we speak of a census of the inhabitants of a State or any of its political divisions, we mean the United States census, for that is the only census in this State which is regularly and periodically taken. The Board of Supervisors had the authority to act on this census, and it did not act by authority when it redistricted the county in August, 1882.

It is contended that the Court erred in admitting in evidence the certificate of the Superintendent above mentioned. We do not think so. The records of this census were under the care and in the custody of that officer, and on common-law principles, as the record could not be taken from his custody, a copy of such census, or any part of it, could be proved by a copy certified by him. But if this is not so, the Court below and this Court can take judicial notice of the results of such census (Sec. 1875 C. C. P.), and resort for information to appropriate documents of reference. (Same section.) That the census was complete when the Board of Supervisors acted on the 11th of August, 1882, and long before that period, we have no doubt. The most conclusive proof of it is found in the Act of Congress passed February 25, 1882, by which an apportionment of the Representatives in Congress, among the several States under the tenth census, was made. (Stats. of U. S. for 1881–2, 5.) Congress would certainly not have legislated in so important a matter as the apportionment of Representatives among the several States, upon an incomplete census.

But it is urged that the relator could not have been legally elected Recorder in 1882, for there was no such officer, the office of Recorder having been in August, 1880, consolidated with that of County Clerk, which consolidation the Board of Supervisors had authority to make, and defendant had been at the election in 1882 elected County Clerk, by which he became *ex-officio* County Recorder.

Conceding that the Board of Supervisors had power to consolidate the offices as contended for, in 1880, still, in

order to effect such consolidation, the order passed by the Board for such purpose must have been published by order of the Board. (Sec. 4106–7 Pol. C.) The publication in a newspaper of the proceedings of the Board in which such order appeared, was not sufficient. The Board made no order for any publication, and therefore the publication above mentioned amounted to nothing, and the consolidation was not effected. Such was the ruling of this Court in *The People* v. *Bailhache*, 52 Cal. 310, and we see no reason to doubt its correctness.

Judgment affirmed.

We concur: Myrick, J., Ross, J., McKee, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed August 9, 1883.]

No. 8822.

BURNS ET AL., RESPONDENTS, *v.* HODGDON, APPELLANT.

APPEAL—FINDING—RES JUDICATA. A finding to the effect that the plaintiff's action is not barred by a former judgment, is not reviewable when the case comes up upon the judgment-roll.

Appeal from Superior Court, Sacramento County.

Freeman & Bates for respondents.
O'Brien, Holl and *Hodgdon* for appellant.

Ross, J., delivered the opinion of the Court:

This case comes up upon the judgment-roll. The point made for the defendant is, that the plaintiffs are concluded by the judgment rendered in a certain action entitled *Hodgdon* v. *Griffin et al.*

As conclusive against the defendant on this point, it is sufficient to refer to the sixth finding of the Court below, which reads: "The right, title and claim now set up by the plaintiffs herein are not the same which were tried and determined in said suit brought by said Hodgdon, but the plaintiffs here have title in fee to said premises and a right to the possession thereof, which were not tried nor determined, nor within any of the issues involved in said suit brought by Wadsworth Hodgdon."

Judgment affirmed.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed August 28, 1883.]

No. 8970.

JUNKINS, RESPONDENT, *v.* BERGIN, APPELLANT.

EVIDENCE—VOID JUDGMENT—DEFAULT—SERVICE—PRACTICE—CLERK. A judgment by default entered by the Clerk, without any action by the Court, is void where one of the defendants in a joint action was never served; and it is error to admit in evidence the judgment-roll in such case in support of an action to quiet title by one claiming under such judgment.

Appeal from Superior Court, Trinity County.

C. E. Williams and *White & George* for respondent.
W. J. Tinnin and *H. O. & W. H. Beatty* for appellant.

STATEMENT.

In 1879 John Whitmore and D. A. Reed began an action against Ah Hoe, Mon Kong, Ah Juan, Ah Sam and Charley Hop Lee for goods sold and delivered to them at their request. The defendant Ah Sam was not served, the others failed to appear, and judgment by default was rendered by the *Clerk* against "the defendant Ah Hoe *et al.*" Execution issued and was levied on the property of the defendants in that action—water-rights and ditch—and the same was sold to John Whitmore. Whitmore sold to the plaintiff Junkins, who brought this action to quiet title. At the trial the plaintiff offered in evidence the judgment-roll, and then separately the complaint, summons, default and attachment, in *Whitmore and Reed* v. *Ah Hoe et al.*, which was admitted by the Court. Defendants claimed through one Davis, who claimed under the U. S. Government by prior appropriation and use. The plaintiff urged that, notwithstanding Ah Sam was not served, the judgment was good as to those served, and the plaintiff might maintain an action to quiet title as against the defendant, who was a mere trespasser.

THORNTON, J., delivered the opinion of the Court:

This action was brought to quiet title, and judgment was rendered for plaintiff. Defendant's motion for a new trial was denied, and he appealed from the judgment and order denying the motion.

The judgment-roll in *Whitmore and Reed* v. *Ah Hoe et al.* was improperly admitted in evidence. The action was a joint one against all the defendants, Ah Hoe, Mon Kong, Ah Juan, Ah Sam and Charley Hop Lee. Ah Sam was never served with process, and the action was never dismissed as

to him. The judgment was by default, and was entered by the Clerk, without any action of the Court. The judgment was void. The Clerk is only authorized to enter judgment by default, such as the one entered herein, when all the defendants have been served and have failed to answer. (Sec. 585 C. C. P.) The Clerk is a minister or servant of the law, to act in that state of the case in which the law orders him to act. Then only is his action valid. When the *casus legis* does not exist, his entry of judgment is void and of no avail. This very point was determined in *Kelly* v. *Van Austin*, 17 Cal. 565–6, where, as here, the judgment was collaterally attacked. This ruling has been frequently approved. (See cases cited in notes to *Kelly* v. *Van Austin*, above referred to, in the 2d edition of 17th Cal., issued in 1872.)

The Court therefore erred in admitting the judgment-roll and all the other documents in the case above mentioned.

As the above is conclusive against the plaintiff's right to recover, it is unnecessary to pass on the other points made and argued.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT NO. 1.

[Filed August 29, 1883.]

No. 8942.

HARRIS, ADMINISTRATRIX, ETC., APPELLANT,

v.

HARRIS ET AL., RESPONDENTS.

TRANSFER—MENTAL INCAPACITY. Where the owner of personal property is, because of mental incapacity, unable to make a transfer, the execution and delivery of a bill of sale by him conveys no title to the vendee, or his subsequent vendees.

Appeal from Superior Court, Lassen County.

E. V. Spencer and *C. McCloskey* for appellant.

C. G. Kelley and *C. L. White* for respondents.

MCKEE, J., delivered the opinion of the Court:

The appeal under consideration is from the judgment alone. From the findings it appears that on the 17th of May, 1880, James H. Harris was the owner and in possession of the band of horses which is the subject of controversy, and that on that day he conveyed the band by a bill of sale, which he signed, executed and delivered, to the de-

fendant E. A. Harris, who afterward, on November 1, 1880, sold and delivered the horses to his co-defendants, Moulton and Myers. But the Court also found as follows:

"That for several days prior to the said 17th day of May, and up to his death, on the 18th day of May, 1880, the deceased was completely paralyzed in his body and limbs, so as to be utterly and entirely helpless, and incapable of doing any act or thing, and was so affected in his mind and reasoning faculties as to be incompetent to transact any business whatever.

"That while deceased was so helpless, and without understanding of the nature and quality of his acts, and but a few hours before his death, the defendant E. A. Harris procured to be made the said bill of sale, purporting to convey all of the said band of horses to E. A. Harris for the consideration of one thousand dollars, and that the deceased was induced to sign, execute and deliver said bill of sale without understanding or comprehending the nature, scope or extent thereof, he, the deceased, being at the time without mind, without reason, and without will, either to act or not to act."

And upon the findings judgment was entered in favor of the defendants Moulton and Myers, and against the defendant E. A. Harris.

The findings are ambiguous. If the Court meant to find as a fact that the original vendor, James H. Harris, sold and delivered the property to his vendee, E. A. Harris, by a bill of sale, duly executed and delivered, then the title to the property passed to the vendee, and his subsequent vendees became the owners of the property. But if there was no such transfer by reason of the mental incapacity of James H. Harris to execute the bill of sale, then the transaction was absolutely void (Sec. 1550 C. C.); the title of the owner did not pass either to the the defendant E. A. Harris or his co-defendants, Moulton and Myers (*Boggs* v. *Hardgrave*, 16 Cal. 560; *Robinson* v. *Haas*, 40 *id.* 474; *Mitchell* v. *Hackett*, 25 *id.* 538), and the plaintiff was entitled to recover.

Construing, however, the findings as a whole (as they are entitled to be construed) to mean that the execution and delivery of the bill of sale was mere form, which only purported to transfer, but did not in fact transfer, the property, because of the mental incapacity of James H. Harris to execute such a document, or to enter it to a contract of sale, the decision of the Court is erroneous.

The judgment must therefore be reversed, and the cause remanded for a new trial. So ordered.

We concur: Ross, J., McKinstry, J.

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Current Topics.

VALIDITY OF FOREIGN DIVORCE DETERMINED BY DOMICILE.

The English Court of last resort, the House of Lords, has recently held that a dissolution by a foreign Court of a marriage celebrated in England was valid, the domicile of the parties being in the country of the forum. It was contended by so able a lawyer as Benjamin, backed by the authority of Lord Brougham, that a marriage celebrated in England could be dissolved only in accordance with English law. This has been the current belief upon the subject. The House of Lords, in Harvey's Case, 28 Alb. L. J. 212, declares that England must fall into line with other nations, and leave the question of divorce to the jurisdiction of the forum where the parties are domiciled.

LAWYERS.

"Our profession is one of the necessities of civilization.

"There is no occasion for lawyers where the only test of human rights is the will of the strongest. * * * * *

"A lawyer needs, first of all, moral honesty and moral courage. People in other occupations oft 'succeed,' as the world phrases it, without these. * * * * *

"But a lawyer must be honest first with himself, because without that he cannot be honest with others. Many a difficult cause has been determined by the moral weight of counsel.

"The legal profession in the United States has always been weaker numerically than either of the so-called learned professions, but in general has always been regarded as more potent, for it has lifted with the longest lever the material interests and passions of men." (From a paper read before the American Bar Association, by John W. Shirley. Alb. L. J., Sept. 28, 1883.)

STANDARD INSTRUCTIONS ON THE SUBJECTS OF CONTRIBUTORY AND COMPARATIVE NEGLIGENCE.

We copy the following from the Chicago Legal Advertiser (Sept. 11th, 1883), adding some notes as to California decisions:

"One of the Judges of the Superior Court of this county favors us with the following series of instructions lately given in his Court upon the questions of comparative and contributory negligence, and slight and gross negligence, citing authorities in support of the principle stated, which will be found useful to those engaged in suits involving these questions:

" 'ORDINARY AND DUE CARE.

" '(Due care—see statement of the law in regard to this matter in *I. & St. L. R. R. Co.* v. *Evans*, 88 Ill. 64.)

" 'It is an essential element to the right of action in all cases, that the plaintiff or party injured must himself exercise *ordinary* care, such as a reasonably prudent person will always adopt for the security of his person or property.

[48 Cal. 422.]

" 'Before any recovery can be had in this case, it is incumbent on the plaintiff to show that he was in the observance of due care for his personal safety, and the burden of proving this is upon the plaintiff. (103 Ill. 521; 83 Ill. 357; 58 Ill. 272; 105 Ill. 370: 88 Ill. 64.)

[Contributory negligence on the part of the injured party is a matter of *defense*, to be to be proved *affirmatively* by the *defendant*, unless it can be inferred from circumstances proved by the plaintiff. (48 Cal. 426; 10 Pac. C. L. J. 599; 11 *id.* 410.)]

"'In determining what is ordinary care, what is slight or ordinary negligence, and what is gross negligence, it is the duty of the jury to take into consideration the rights, the duties and obligations and situation of the respective parties under the peculiar circumstances in evidence, and all of the facts and circumstances given in evidence in the case.

[55 Cal. 593.]

"'The cases all go to the length of holding where a party has been injured for the want of ordinary care, no action will lie unless the injury is willfully inflicted. (*Chic., B. & Q. R. R.* v. *Lee*, 68 Ill. 580; *St. Louis, A. & T. R. R. Co.* v. *Manly*, 58 Ill. 300; *C., B. & Q. R. R. Co.* v. *Johnson*, 103 Ill. 521; *W. St. L. & P. Ry. Co.* v. *Shacklett*, 105 Ill. 370.)

"'If the plaintiff did not use ordinary care to prevent the injury in question, and such want of ordinary care produced said injury, he cannot recover, even though the defendant was guilty of gross negligence, unless the injury was willfully inflicted. (105 Ill. 370; 9 Brad. 623; 58 Ill. 300; consult 95 Ill. 33; 103 Ill. 521.)

[48 Cal. 423; 56 Cal. 519; 59 Cal. 270.]

"'To recover for injuries alleged to have been caused by the negligence of defendant, it is necessary that the plaintiff shall allege in the declaration and prove on the trial that the plaintiff was exercising due care. The plea of not guilty puts this allegation in issue, and the burden of proving due care on the part of the plaintiff rests upon the plaintiff. (88 Ill. 64; 105 Ill. 370.)

[The complaint need not allege that the injury was done without fault of the plaintiff. (48 Cal. 426.)]

"'CONTRIBUTORY AND COMPARATIVE NEGLIGENCE.

"'In this case it is necessary for the plaintiff to prove that he was not guilty of such negligence as did contribute materially to the injury complained of.

"'The plaintiff cannot recover in this case if guilty of contributory negligence, if the jury simply find from the evidence that his negligence was slight in comparison with that of the defendant, or if the defendant's negligence was simply greater than that of the plaintiff, because the defendant's liability does not depend upon a mere preponderance of negligence.

"'The rule in this State in regard to contributory negligence is this: that where the negligence of the defendant is gross, the

plaintiff may recover, although his own negligence may have contributed in some degree to the injury, provided his negligence was slight and that of the defendant's was gross when compared with each other, and it was through such gross negligence of the defendant that the injury occurred. (88 Ill. 65; 95–33.)

" 'Where there is negligence on the part of the injured party, contributing directly to produce the injury, and also negligence on the part of the defendant which contributed to the injury of the plaintiff, there can be no recovery unless such negligence on the part of the plaintiff is slight and that of defendant is gross in comparison with each other in regard to that which caused the injury complained of.

" 'To authorize a recovery in a case of contributory negligence it must appear from the evidence that the negligence of the plaintiff is slight, and that of the defendant gross, in comparison with each other (90 Ill. 428; 72 Ill. 351); and it must also appear by the evidence that such gross negligence contributed to the injury. (*Harms* v. *Sullivan*, 1 Brad. 255.)' "

[The *formula* is not that any degree of negligence on the part of the plaintiff which directly concurs in producing the injury will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, *proximately* to the injury, the plaintiff shall not recover. (48 Cal. 422, 3.)

When there has been mutual negligence, and the negligence of each party was the *proximate* cause of the injury, no action whatever can be maintained. In the use of the words " proximate cause" is meant negligence at the time the injury happened.

If there be negligence on the part of the plaintiff, yet if at the time when the injury happened it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury. (37 Cal. 422, 406; 59 Cal. 270.)]

" 'In every case where it appears from the evidence that there is contributory negligence on the part of the plaintiff (or deceased) it is for the jury to determine from all the evidence the relative degrees of negligence of the parties, and unless they believe from the evidence that the negligence of the plaintiff, or deceased, is slight and that of the defendant *gross* in comparison with each other, and that such gross negligence directly

contributed to the injury, there can be no recovery, and the burden of proof in establishing this and the relative degrees of negligence is on the plaintiff. (88 Ill. 64; 90 Ill. 428; 72 Ill. 351.)

" 'While the rule is well settled in this State that a recovery may be had by a party who has been guilty of contributory negligence, where his negligence is slight and that of the defendant gross, yet the authorities all agree that it is an indispensable element of the right of action in every case that the plaintiff or party injured must have exercised ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property. (*I. C. R. R. Co.* v. *Hethrington*, 83 Ill. 510; *C. & A. R. R. Co.* v. *Becker*, 76 Ill. 27; 81 Ill. 19; 2 Brad. 34: 9 Brad. 623–4; 103 Ill. 521; 105 Ill. 370.)

" 'If both parties are equally in fault, then the plaintiff cannot recover. (*O. & M. Ry. Co.* v. *Porter*, 92 Ill. 439.)

" 'The following instruction by the same case is bad, to wit: "You cannot find defendant guilty unless you believe from the evidence that the injury complained of was caused by the negligence of the defendant and the plaintiff was without fault" (p. 439); the reasons for this are given in this case.

" 'Where the plaintiff is guilty of contributory negligence he cannot recover, unless it appears that his negligence was slight and that of the defendant gross in comparison with each other. (92 Ill. 141; 72 Ill. 347.)

" '(As to higher degree of negligence, see 55 Ill. 389; 88 Ill. 443.)

" 'The negligence of plaintiff, which will defeat his recovery, must be a proximate cause of the injury, and the act must be one he could reasonably anticipate would result in his injury.

" 'If the defendant by his own act throws the plaintiff off his guard, the lack of vigilance is not imputable to him as negligence.

" '(For two instructions in sidewalk cases see *City of Chicago* v. *Stearns*, 105 Ill. 557.)

" 'A person who from an impulse of fear produced by the wrongful act of another acts erroneously and in consequence thereof receives an injury which he would not otherwise have received, will not be precluded from recovering damages on the ground of contributory negligence. (10 Mo. App. 197.)

" 'The negligence must be proved, and unless it appears from the proof that the plaintiff's case under all of the evidence is proved, as alleged, there can be no recovery. (*C., B. & Q. R. R. Co.* v. *Harwood*, 90 Ill. 429.)

" 'DEATH IN CASE OF NEGLIGENCE—DAMAGES.

" 'The jury are instructed that if, under the evidence and instructions of the Court, the jury find the defendant guilty, then in estimating the plaintiff's damages it will be proper for the jury to consider the effect of the injury upon the health of the deceased; if they believe from the evidence that her health was

affected by the injury in question, and also her ability after said accident to attend to her affairs generally in pursuing her ordinary trade or calling; if the evidence shows that the same was affected by said accident, and also the bodily pain and suffering she underwent, the necessary expenses of nursing and medical care and attendance, and loss of time, so far as these are shown by the evidence, can be treated as the necessary result of the injury complained of.

" 'The jury cannot consider the death of plaintiff's decedent as an element of damage, but only all damage sustained by her up to the time of her death. (*Holton* v. *Daly*, 106 Ill. 135; *City of Chicago* v. *Stearns*, 105 Ill. 557.)

" 'If the plaintiff has made out his case as laid in his declaration, the jury must find for the plaintiff. (*O. & M. R'y Co.* v. *Porter*, 92 Ill. 441.)

" 'In the case of *I. C. R. R. Co.* v. *Baches*, 55 Ill. 388, this instruction was given relating to the pecuniary circumstances of the widow and her children when she brought suit as administratrix of her deceased husband, to wit:

" 'The pecuniary circumstances of the plaintiff and her infant daughter, at the time of and since the death of Jacob Baches, cannot increase or diminish the amount of damages which the plaintiff is entitled to recover in this suit, in case the jury find the issue for her, and if the jury so find, they are instructed, in the assessment of damages, to disregard all the testimony as to the pecuniary circumstances of said plaintiff and her infant daughter at the time of and since the death of said Jacob Baches.

" '(As to the rights and duties of persons crossing a railroad track over a public highway, see the instruction in the case of *I. C. R. R. Co.* v. *Baches*, 55 Ill. 386.)' "

[As to the rights and duties of persons using a railroad track as a highway, see 59 Cal. 270.]

[The jury can consider the death of plaintiff's decedent, and give such damages as under all the circumstances of the case may be just. (Civil Code, 377; 9 Pac. L. J. 608; 10 *id.* 604; 11 *id.* 504, 5; 57 Cal. 37; 56 Cal. 388.)]

GUILTY OR NOT GUILTY?

A man named Jacob Hoffman, of Tamaqua, Pennsylvania, falling under suspicion of having stolen a horse from a Mr. Job, on being accused of the crime, protested his innocence in most emphatic language, calling God to strike him dead if he was guilty. In less than ten minutes he dropped to the ground a corpse.

In the Circuit Court of the United States,

NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

THE PACIFIC COAST STEAMSHIP COMPANY
v.
THE BOARD OF RAILROAD COMMISSIONERS.

INTER-STATE COMMERCE—POWER OF THE STATE TO REGULATE. The State Board of Railroad Commissioners has no power to regulate or interfere with the transportation of persons or merchandise, by a steamship company, between ports within the State, if they be in transit to or from other States, or when in navigating the ocean the vessel goes beyond a marine league from the shore. This power has been conferred upon Congress and is exclusive.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge:

The plaintiff is a corporation formed under the laws of California, for the transaction of the business of a steamship company on the Pacific coast, and in its bays and harbors, and on the Pacific Ocean. It is the owner of a large number of steamships engaged in the coasting trade, making voyages along the Pacific Coast from San Francisco, in California, to Astoria and Portland, in Oregon; to ports on Puget Sound, in Washington Territory, and to ports in British Columbia, and from San Francisco to San Diego, in California, touching at intermediate ports on the coast.

All the steamships in making their voyages navigate the Pacific Ocean more than a marine league from the shore. They carry goods sent from Europe, Asia and States east of the Rocky Mountains, upon through bills of lading *via* San Francisco. Some of the goods are transferred to the vessels in the original unbroken packages, and some after the packages have been opened. Passengers, with and without through tickets from other States and from Europe, are carried on the steamships north and south from San Francisco. Passengers and freight are also carried in these vessels from ports in California to other ports in the State. All the vessels are enrolled and licensed to carry on the coasting trade under the Acts of Congress.

By the Constitution of California, adopted in 1879, all railroad, canal and other transportation companies, are declared to be common carriers and subject to legislative control. Provision is also made for the election of three persons called Railroad Commissioners, who are invested with the power, and it is made their duty, to establish rates of charges for transportation of passengers and freight by such companies, and publish the same from time to time; to examine their books, records and papers; to hear and determine complaints against them; to punish for contempt of

the orders and processes of the Commissioners, and enforce their decisions; and to provide a uniform system of accounts to be kept by the companies.

The complaint in this case is that the defendants, the Commissioners, elected under these provisions of the Constitution, intend and threaten to establish rates of charges for passengers and freights on the steamships of the plaintiff engaged in the coasting trade as mentioned, and exercise with respect to them all the other powers there conferred; and the plaintiff prays that they may be restrained in that respect. This suit was commenced when the late Commissioners were in office, but as it is against the Board as an official body, and not the members personally, it has been resubmitted for decision within the past month.

The defendants admit that it is their purpose to carry into execution the powers with which they are invested, and to establish rates of charges for passengers and freight upon the steamships, so far as relates to transportation between ports within the State, but disclaim all intention to regulate or interfere with the transportation of persons or freight from ports within the State to ports without it, or from ports without it to ports within it.

The question is, Can they regulate or interfere with transportation of persons or merchandise between ports within the State, if they be in transit to or from other States, or the transportation involves a voyage upon the ocean. The question in one of its aspects is new, but in neither aspect is it difficult to solve. The Constitution vests in Congress the power to regulate commerce with foreign nations and among the several States. The power to regulate is the power to govern; to prescribe the rules by which commerce shall be conducted, to declare when it shall be burdened with conditions, and when it shall be free and untrammeled.

Commerce, as has often been said, is a term of large import. It includes the carriage of persons, and the transportation, purchase, sale and exchange of commodities between citizens or subjects of other countries and our own people, and between the people of different States. It embraces navigation, and extends to all the instruments used in navigating inland waters and the ocean.

It was at one time a subject of much discussion and some disagreement among Judges, whether the power conferred upon Congress to regulate commerce is exclusive in its character, or concurrent with that of the States. By recent decisions this question has been put at rest. When the subject upon which Congress can act under this power is na-

tional in its character, and admits and requires uniformity of regulation, affecting alike all the States, then the power is in its nature exclusive; but when the subject upon which the power is to act is local in its operation, then the power of the State is so far concurrent that its action is permissible until Congress interferes and takes control of the subject. Of the former class, is all that portion of commerce with foreign countries and among the States, which consists in the carriage of persons and the transportation, purchase, sale and exchange of commodities. From necessity, there can be but one rule in such cases for all the States; and the only power competent to prescribe a uniform rule is one which can act for the whole country. Its non-action in such cases is, therefore, equivalent to a declaration that such commerce shall be free from State interference. "There would otherwise be," as said in *County of Mobile* v. *Kimball*, "no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens and against the products and citizens of other States. But it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States, was to insure uniformity of regulation against conflicting and discriminating State legislation." (102 U. S. 697; see, also, *Cooley* v. *The Board of Wardens of the Port of Philadelphia*, 12 How. 299; *Gilman* v *Philadelphia*, 3 Wall. 713; *Wellton* v. *State of Missouri*, 91 U. S. 275.)

Of the second class, are all those subjects which can be best regulated by local authority, such as harbor pilotage, and the placing of buoys and beacons to guide ships to the proper channel in entering bays and harbors. Action by the States upon such subjects is not deemed any encroachment upon the power of the General Government; but when Congress acts with respect to them, the authority of the State is superseded.

It follows from these views that with respect to all inter-State or foreign commerce, the Railroad Commissioners have no authority to interfere. Congress has prescribed all the regulations which are permissible so far as that commerce is carried on in vessels. These regulations, it is true, are principally designed to insure safety in the navigation of the vessels and the protection and health of their officers and crews. Congress has not attempted to prescribe what charges may be made for the carriage of persons and merchandise in vessels—considering, perhaps, that they were more likely to be regulated upon just and equitable

principles by competition than by legislation. Whatever the reason, Congress has not seen fit to act upon that subject.

With respect to purely domestic commerce carried on by these vessels, the Commissioners possess all the authority which the State can confer. But when can the vessels in carrying persons and merchandise between different ports in the State be held to be engaged in commerce purely domestic? for there is a commerce within the State which does not come within that designation. We answer that they are not so engaged when they take up persons or merchandise to carry to a destination within the State from a place without it, or they take up persons or merchandise in the State to carry to a place without its limits. This is the purport of the decision of the Supreme Court in the case of the steamer "Daniel Ball" (10 Wallace, 557). That vessel was engaged in shipping and transporting down Grand River, in Michigan, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits. But as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with or in continuation of any line of vessels or railway leading to other States, it was contended that she was engaged entirely in domestic commerce. But the Court answered that the conclusion did not follow, and said that "So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress." (10 Wallace, 565.)

Nor are the vessels engaged in purely domestic commerce when their voyages between ports of the same State require them to navigate the ocean. When they go beyond the marine league they pass out of the jurisdiction of the State,

and come under the exclusive control of Congress. To bring the transportation within the control of the State as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State. (*Lord* v. *Steamship Company*, 102 U. S. 541.)

If the steamships of the plaintiff carried any persons or merchandise between ports of the State, not going out, on their voyage between those ports, of the jurisdiction of the State, and the persons or merchandise carried not coming from any other State or a foreign country, or going to another State or country, the transportation commencing and ending in the State, then to that extent they would be engaged in commerce purely domestic, and to that extent the Railroad Commissioners might have jurisdiction to regulate the fares and freights for transportation on the vessels. But it is conceded by the pleadings that in every voyage made by the vessels to ports from San Francisco, they pass out upon the ocean beyond a marine league from the shore. They are, therefore, engaged in no transportation which the Commissioners can regulate.

We have had some doubt as to our jurisdiction in this case, but as the Commissioners have raised no objection on that ground, and seem anxious to have an adjudication as to the extent of their authority, we have not deemed it expedient to refuse a consideration of the questions submitted. Besides, without some adjudication upon them, the plaintiff would be placed in great embarrassment. If the Commissioners have the authority claimed, the company would be liable to a fine of twenty thousand dollars for every instance of disregard of their regulations, and each of its officers would be liable to be punished by fine and imprisonment.

Let a decree be entered for the plaintiff as prayed in the bill.

IN THE MATTER OF PONG AH LUNG, ON HABEAS CORPUS.

TREATIES AND LAWS—CONFLICTING PROVISIONS. An Act of Congress upon a subject within its legislative power is as binding upon the Courts as a treaty on the same subject. Both are binding except as the latter one conflicts or interferes with the former. Whether a treaty has been violated by our Government in its legislative department so as to be the proper occasion of complaint by a foreign Government, is not a judicial question. To the Courts, it is simply the case of conflicting laws, the last modifying or superseding the earlier.

CHINESE IMMIGRATION—BRITISH SUBJECTS. A Chinese laborer, born on the Island of Hongkong after its cession to Great Britain, is within the provisions of the Act of Congress of May 6, 1882, restricting the immigration of Chinese laborers to the United States. The purpose of the Act was to carry out certain treaty stipulations with China, and to exclude Chinese laborers coming from any part of the world.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge:

The petitioner sets forth that he is unlawfully restrained of his liberty, and detained on board of the steamship "Oceanic" by its captain, in the harbor of San Francisco; that the alleged ground of his detention is that he comes within the Act of Congress of May 6, 1882, "to execute certain treaty stipulations relating to Chinese." (22 Stats. 58.)

The petitioner is a Chinese by race, language and color, and has all the peculiarities of the subjects of China. He is also a laborer; but he was born on the Island of Hongkong after it was ceded to Great Britain. He claims, therefore, to be a British subject, and as such exempt from the Act of Congress. But for this fact of birth in the British dominions it is conceded that he would be within the provisions of the Act. Does this fact take him out of them? The answer to this question depends upon the meaning of the Act, and not upon the fact that the petitioner owes allegiance to any other sovereign than that of China. Undoubtedly the Courts will always construe legislation in harmony with treaty stipulations, where its sole purpose is to carry those stipulations into effect. It will not be presumed, in the absence of clear language to that purport, that Congress intended to disregard the requirements of a treaty with a foreign Government, or to abrogate any of its clauses. At the same time, an Act of Congress must be construed according to its manifest intent, and so far as the Courts are concerned, must be enforced. A treaty is in its nature a contract between two nations, and by writers on public law is generally so treated, and not as having of itself the force of a legislative act. The Constitution of the United States, however, places both treaties and laws, made in pursuance thereof, in the same category, and declares them to be the supreme law of the land. It has not given to either a paramount authority over the other. So far as a treaty operates by its own force without legislation, it is to be regarded by the Courts as equivalent to a legislative act, but nothing further. If the subject to which it relates also falls within those upon which Congress can act, its legislation may modify the provisions of the treaty or supersede them entirely. The immigration of foreigners to the United States, and the conditions upon which they shall be permit-

ted to remain, are matters which may be subjects of treaty stipulation, and also of Congressional action. No treaty can deprive Congress of its power in that respect. As said by Mr. Justice Curtis in the case of *Taylor* v. *Morton:* "Inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President, while they continue unrepealed; and inasmuch as the power of repealing these municipal laws must reside somewhere, and nobody other than Congress possesses it, then legislative power is applicable to such cases whenever they relate to subjects which the Constitution has placed under that legislative power." (2 Curtis, Cir. Ct. Rep., 458.)

An Act of Congress, then, upon a subject within its legislative power is as binding upon the Courts as a treaty on the same subject. Both are binding except as the latter one conflicts or interferes with the former. If the nation with whom we have made the treaty objects to the action of the Legislative Department, it may present its complaint to the Executive Department, and take such other measures as it may deem that justice to its own citizens or subjects requires. The Courts cannot heed such complaint nor refuse to give effect to the laws of Congress, however much they may seem to conflict with the stipulations of the treaty. Whether a treaty has been violated by our Government in its Legislative Department so as to be the proper occasion of complaint by the foreign Government, is not a judicial question. To the Courts it is simply the case of conflicting laws, the last modifying or superseding the earlier.

The question then is, What is the true construction of the Restriction Act? Whom does it embrace? Some assistance in arriving at a correct conclusion will be had by reference to the treaties with China, and the circumstances leading to the passage of the Act.

In the 5th Article of the treaty of July, 1868, commonly known as the Burlingame Treaty, the contracting parties declare that "they recognize the inherent and inalienable right of man to change his home and allegiance; and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to the other, for the purposes of curiosity, of trade, or as permanent residents." In its 6th Article they declare that "Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation, and recip-

rocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions, in respect to travel or residence, as may be enjoyed by the citizens or subjects of the most favored nation."

Before these Articles were adopted, a great number of Chinese had emigrated to this State; and after their adoption, the immigration was largely increased. But notwithstanding the favorable provisions of the treaty, it was found impossible for them to assimilate with our people. Their physical characteristics and habits kept them as distinct and separate as though still living in China. They engaged in all the industries and pursuits of the State; they came in competition with white laborers in every direction; and their frugal habits, the absence of families, their singular ability to live in narrow quarters without apparent injury to health, their contentment with the simplest fare, gave them in this competition great advantages over our laborers and mechanics. They could live with apparent comfort on what would prove almost starvation to white men. Our people are not content, and never should be, with the means of bare subsistence; they must have something beyond this for the comforts of a home, the support of a family and the education of children. Competition with Chinese labor under the conditions mentioned was necessarily irritating and exasperating, and often led to serious collisions between persons of the two races. It was seen that without some restriction upon the immigration of Chinese, white laborers and mechanics would be driven from the State. They looked, therefore, with great apprehensions toward the crowded millions of China and of the adjacent islands in the Pacific, and felt that there was more than a possibility of such multitudes coming as to make a residence here unendurable. It was perceived by thoughtful men, looking to the possibilities of the future, that the immigration of the Chinese must be stopped if we would preserve this land for our people and their posterity, and protect the laborer from a competition degrading in its character, and ruinous to his hopes of material and social advancement. There went up, therefore, most urgent appeals from the Pacific Coast to the Government of the United States, to take such measures as would stop the further coming of Chinese laborers. The effect of these appeals was the sending of Commissioners to China to negotiate for a modification of the treaty of 1868. The supplementary treaty of 1880 was the result. This treaty authorized legislation restricting the immigration of Chinese laborers to the United States whenever our Govern-

ment should be of opinion that the coming of such laborers would affect or threaten to affect the interests of the country or endanger its good order, but expressly stipulating that its provisions should not apply to other classes coming to the United States.

The Act of May 6, 1882, followed this new treaty, and in speaking of it in the case of the Chinese merchant, which was before us last year, we said—referring to merchants as as a class—that it was framed in supposed conformity with the provisions of the treaty, and that in the inhibitions which it imposes upon the immigration of Chinese, there was no purpose expressed in terms to go beyond the limitations of the treaty. Undoubtedly, so far as the subjects of China are concerned, no purpose is shown by the Act to go beyond those limitations, and that is all that was intended by language which has been supposed to have a broader meaning.

It was felt necessary to obtain a modification of the treaty with China before legislating with reference to the immigration of Chinese. The Government of China, without such modification, would have had just ground of complaint. It was never supposed that any of the European Governments having within their possessions in the East Chinese subjects would make any complaint to their exclusion from our country. It was well known that the English colonies in Australia had either entirely excluded or had placed under very narrow restrictions the immigration of Chinese into them, without any objection from the mother country. The complaints there from the conflict of white with Chinese labor had been as great and as strongly expressed as any which ever arose in this State. Legislation by Congress excluding or restricting the immigration would never have been so long delayed except from a desire not to offend the Chinese Government. It was not deemed necessary to negotiate with other Governments with respect to Chinese within their borders. So when the Act of Congress was passed, it had a double purpose. It was to carry out, as its title indicates, certain treaty stipulations with China, and also to exclude Chinese laborers coming from any part of the world. Its framers knew, as we all knew, that the Island of Hongkong would pour Chinese laborers into our country every year in unnumbered thousands, unless they also were covered by the Restriction Act. So the Act declares in its first section that from and after the expiration of ninety days from its passage, and until the expiration of ten years, the coming of Chinese laborers to the United States, without any limitation of the country from which they might come, is

suspended, and during such suspension, it shall not be lawful for any Chinese laborer to come, or having come, after the expiration of the ninety days to remain within the United States.

The second section makes it a misdemeanor, punishable by fine or imprisonment, or both, for the master of a vessel to knowingly bring into the United States on his vessel, and land, or permit to be landed, *any Chinese laborer from any foreign port or place.* The language in these sections is sufficiently broad and comprehensive to embrace all Chinese laborers, without regard to the country of which they may be subjects. And the twelfth section declares that any Chinese person found unlawfully within the United States shall be removed therefrom by direction of the President to the country from whence he came—not necessarily to China.

Our attention has been called to a recent decision of Judges Lowell and Nelson of the Circuit Court of the United States for the District of Massachusetts, in which a different conclusion was reached by them. Those Judges considered that the Act of Congress was simply intended to give effect to the stipulations of the supplementary treaty. Undoubtedly, as already said, that was one of its objects; but it is very evident, both from the circumstances under which it was passed and from its language, that it had a still further object. The construction which we give renders all its provisions consistent with each other. The whole purpose of the law to exclude Chinese laborers from the State would be defeated by any other construction.

The release of the petitioner must be denied, and he must be returned to the ship from which he was taken. And it is so ordered.

Supreme Court of California.

IN BANK.

[Filed June 29, 1883.]

No. 8260.

IN THE MATTER OF THE ESTATE OF HENRY E. ROBINSON, DECEASED.

TRUSTS FOR CHARITABLE USES. By Section 1313 of the Civil Code, the city and county of San Francisco is authorized to take a bequest in trust for charitable uses.

Appeal from Superior Court, San Francisco County.

D. P. Belknap for appellant.
C. J. Swift for the executor.
W. C. Burnett for respondent.

Ross, J., delivered the opinion of the Court:

Henry E. Robinson, by his will executed in the State of New York, bequeathed "to the Mayor, Common Council and Commonalty of the city of San Francisco, Cal., the sum of forty thousand dollars ($40,000), in trust, to be by them and their successors invested to the best advantages, the interest accruing thereon to be paid out from time to time to the destitute women and children of the city of San Francisco, Cal., in such a manner as such Mayor and Common Council may deem most proper and beneficial."

Mr. Robinson having died, and administration upon his estate having been had, the Court below, in the decree of distribution, directed the executor to pay out of the estate "to the Mayor and Board of Supervisors of the city and county of San Francisco the sum of forty thousand dollars in trust, to be by them and their successors in office invested to the best advantage, the interest accruing thereon to be paid out from time to time to the destitute women and children of the city of San Francisco, Cal., in such a manner as such Mayor and Board of Supervisors may deem most proper and beneficial." The appeal is from this portion of the decree.

We do not understand appellants to claim that the Court below erred in substituting the legal appellation of the municipality in question for that employed by the testator, but their claim is that the bequest itself is void because prohibited by statute.

In the estate of Hinckley, 58 Cal. 457, we held that trusts for perpetual charitable uses are not in conflict with the Constitution of the State, nor are they in conflict with those provisions of the Civil Code which prohibit perpetuities, and, further, that the perpetuities prohibited by the common law do not include trusts for charitable uses. It is here contended, however, that by Section 1275 of the Civil Code, all corporations other than those formed for scientific, literary or solely educational purposes (within which exception the municipality in question does not come), are prohibited from taking under a will, unless expressly authorized by statute to take, and that the statute nowhere authorizes this corporation to take a bequest in trust for charitable uses.

The first of these propositions is obviously true, for the statute in terms so declares. It reads: "Section 1275. A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except corporations other than those formed for scientific, literary or solely educational purposes, cannot take under a will, unless expressly authorized by statute." But Section 1313 of the same Code is as follows: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation, or to any person or persons, in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy, and each of them, shall be valid; *provided*, that no such devises or bequests shall collectively exceed one-third of the estate of the testator leaving legal heirs, and in such case a *pro-rata* deduction from such devises or bequests shall be made, so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

This section recognizes the right on the part of the testator to give to charitable uses, with such limitations as the Legislature deemed sufficient to prevent extravagant donations—"to the disherison of natural heirs"—for by it it is expressly declared that a bequest or devise made to any charitable or benevolent society, or *corporation*, or to any person or persons, in trust for charitable uses, if made at least thirty days prior to the death of the testator, *shall be valid;* subject to the *proviso* therein contained.

In the present case, the bequest was made more than thirty days prior to the death of the testator, and it does not fall within the *proviso* to the section. There is, therefore, express statutory authority for it, unless there is something in the nature of the corporation upon which the trust is conferred that prevents it from taking. The bequest, as must be admitted, is a most laudable one. It is a charity, for it is not limited to any particular persons. The objects to be benefited were strangers to the testator. They are the destitute women and children of the city of San Francisco. The care, protection and support of these are objects within the general scope and purpose of the municipal corporation, although not its immediate purpose. The purpose for which the trust was conferred being, therefore, germane to the objects of the corporation, there is no

reason why it may not take, under the statute, and abundant authority sustaining the proposition that it may. "Not only may municipal corporations," says Dillon on Municipal Corporations (Vol. 2, Sec. 567), "take and and hold property in their own right by direct gift, conveyance or devise, but the cases firmly established the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of *taking property*, real and personal, *in trust* for purposes germane to the objects of the corporation, or which will promote, aid or assist in carrying out or perfecting those objects. So such corporations may become *cestuys que trust* within the scope of the purposes for which they are created. And where the trust reposed in the corporation is for the benefit of the corporation, or for a charity within the scope of its duties, it may be compelled, in equity, to administer and execute it. But the Legislature may divest a municipal corporation of the power to administer the charitable trusts conferred upon it, and appoint or provide for the appointment of new trustees independent of the corporation, and vest in them the management of such trusts."

Judgment affirmed.

We concur: Myrick, J., Sharpstein, J., Thornton, J., McKee, J.

In Bank.

[Filed August 30, 1883.]

No. 7564.

SPRING VALLEY WATER WORKS, Appellant,

v.

SAN MATEO WATER WORKS et al., Respondents.

Eminent Domain—Condemnation of Property already Appropriated to Public Use—Public Convenience. The plaintiff, a water company, sought to condemn, for a public use, twenty-eight acres of land, the property of defendant, a water company. The defendant claimed to have already appropriated the lands to a public use. The plaintiff alleged that the public use to which it proposed to appropriate the property was greater than that represented by the defendant. The trial Court found "That the use of the land is not a necessity to the plaintiff, but would be a great convenience, and enhance the value of its property, and secure a fuller water supply to the inhabitants of San Francisco," and gave judgment for the defendant. Plaintiff contended that the decision was against the law and the evidence.

Held: (1.) That the evidence justified the findings. (2.) That a public convenience is not such a necessity as authorizes the exercise of the right of eminent domain.

Appeal from Superior Court, San Mateo County.

Fox & Kellogg for appellant.

Garber, Thornton & Bishop, Estee & Boalt, and *W. H. L. Barnes* for respondents.

McKEE, J., delivered the opinion of the Court:

This case arises out of a proceeding commenced under Part III, Title VII, C. C. P., relative to the subject of eminent domain. As shaped by the pleadings, the proceeding indirectly involves a controversy between two water corporations, each incorporated under the laws of the State, and claiming to be in charge of a public use, for which it asserts the right to appropriate private property. In the exercise of that right the plaintiff seeks, by the proceeding in hand, to condemn twenty-eight acres of land in San Mateo County, which, it alleges, form part of the cañadas, valleys and cañons which, uniting near a place in the said county known as Crystal Springs, constitute, with their creeks, streams, rivulets, lagoons, springs and catchments, the only adequate source from which the plaintiff can derive its necessary supply of water for its corporate purpose, within any distance from which water can be conducted to San Francisco, and without an expenditure of many millions of dollars more than would be required to appropriate and utilize the land in controversy, or without an expenditure greatly disproportionate to the benefit to be derived therefrom.

Admittedly, the title to the land sought to be condemned is in the defendant, which claims to have already appropriated the land to the use of the public, for its corporate purpose of appropriating and storing water for distribution and sale to the inhabitants of San Mateo County. This the plaintiff denies; but also affirms that if such appropriation has been made by the defendant, the public use to which he proposes to appropriate the land, *i. e.*, for the corporate purpose of appropriating and storing water for distribution and sale to the inhabitants of the city and county of San Francisco, is a greater public use than that represented by the defendant.

Whether the public use represented by the plaintiff is greater than that represented by the defendant, is a subordinate question to the main question involved in the proceeding itself as to the necessity for appropriating the land for the public use; and as that is a judicial question, and lies at the foundation of the right asserted by the plaintiff, it became the imperative and controlling issue in the

case. (*In re N. Y. C. & H. R. R. Co.* v. *M. G. L. Co.*, 63 N. Y. 326; *Kohl* v. *United States*, 91 U. S. 367.) Upon that issue the Court found as follows:

"*Tenth.* That the use of the said land is not a necessity to the Spring Valley Water Works, but would be a great convenience and enhance the value of its property, and secure a fuller water supply to the inhabitants of San Francisco.

"*Eleventh.* That the present water supply of the said Spring Valley Water Works is fully equal to the wants of the people of San Francisco, and will so remain for many years—at least four years—and that a larger catchment could be secured by said Spring Valley Water Works with small expense.

"*Twelfth.* That said Spring Valley Water Works has other sources of supply, which water can be utilized by it as a good money-making investment long before the inhabitants of San Francisco will need the same."

From these facts the Court found as a conclusion of law that the plaintiff was not entitled to judgment of condemnation. But it is contended that the decision is against the law and the evidence; and that is the principal question involved in the case, for the specifications of error are that the decision is not sustained by the findings, and that the findings are not sustained by the evidence.

In this Court, it is incumbent upon the appellant on such a contention to show that in the evidence upon which the findings are based, there was no substantial conflict, and that the facts and the inferences deducible from them as found by the Court were contrary to the evidence. We think the evidence upon which the plaintiff rested its case justified the findings.

The evidence consisted of the testimony of the Chief Engineer and Superintendent of the plaintiff; and it related to the sources of supply of water possessed by the plaintiff during the time over which the testimony of the witnesses extended, the increase of the population of San Francisco, the requirements of the city for water, and the constant increase from year to year of those requirements. As to those points, the evidence seems to have been *uncontradicted;* and it tended to prove that the plaintiff had obtained its supply of water for the use of San Francisco for fourteen years from certain creeks known as Pilarcitos, San Andreas, Lobos, Islais and San Mateo. The Pilarcitos was the first source of supply, and the second was the Islais. Finding that running streams of water without storage reservoirs would be insuffi-

cient and unreliable as a source of supply, the plaintiff, in 1863, built what is known as the Upper Pilarcitos Dam, and in 1866–67 what is known as the Lower Pilarcitos Dam; and in 1867 it commenced to build on the San Andreas a reservoir which was completed in 1869; and afterward—in 1874—an addition was made to it.

From these sources the plaintiff had, for fourteen years, furnished water to the city of San Francisco and its inhabitants. But in 1874 the engineer of the plaintiff began to discover that the catchment and storage capacity of the sources of supply, of which the plaintiff was then in possession, must be increased. It could not safely rely on the Pilarcitos and San Andreas combined, with all their water-rights and waste-water caught, to produce more than nine million gallons daily. Meanwhile the population of San Francisco was constantly increasing, and the requirements for water kept pace with the increase of population. The daily consumption of water and the increase of population were shown by the following table:

Year.	*Population.*	*Daily Consumption of Water.*
1864	115,000	2,500,000 gallons
1867	150,000	4,500,000 gallons
1870	180,000	5,500,000 gallons
1874	240,000	8,700,000 gallons
1875	250,000	10,500,000 gallons
1876	290,000	12,500,000 gallons
1879 (time of trial)	310,000	12,000,000 gallons

The sources of supply were also subject to be affected by the variability of the rain-fall in California. That variability from 1850 to 1876–77 was shown to have been as follows:

Season.	*No. of inches.*	*Season.*	*No. of inches.*
1850–51	7.40	1870–71	14.10
1861–62	49.27	1871–72	34.71
1862–63	13.62	1874–75	18.40
1863–64	10.08	1876–77	9.87

In those circumstances the capacity of the plaintiff to supply San Francisco and its inhabitants with water began to be publicly questioned. The newspaper press took up the question, and its discussion agitated the public mind and caused dissatisfaction with the plaintiff, so that, as the Engineer expressed it, "the people that had been ordinarily using a reasonable amount of water in their households, and even with a fair allowance for waste, all of a sudden com-

menced to waste water so fearfully that at that rate we would not be able to keep up the supply much longer. In fact, the daily demand from 1874 until 1875 increased to 2,000,000 gallons, daily, while in former years, in ten years, the increase had been only 6,000,000 gallons during the ten years, or an average of 600,000 gallons yearly." The plaintiff, therefore, found itself confronted with the question "Whether it would adopt stringent measures to repress the waste or incur additional expenditure in order to provide an additional supply for the people to waste." Conference and consultation upon that question resulted in the determination upon the part of the Engineer, the President and the Board of Directors "to strike a medium road by partly checking the waste and increasing the sources of supply." Waste was to be stopped by meters, and the supply increased by the acquisition of the Crystal Springs property and the construction of reservoirs thereen. The meter experiment caused public irritation, and proving unsatisfactory it was soon abandoned. But the Crystal Springs scheme was projected and surveyed. That scheme involved the appropriation of a valley, containing about 160 acres of land, lying back of the towns of Milbrae, San Mateo and Belmont; bounded on the west by the Coast Range Mountains, and on the north and south by hills and mountains. According to the evidence, the valley was originally a natural lake, full of water, which forced an outlet through the hills of San Mateo at the place where the San Mateo Creek makes its way through the hills to the San Francisco Bay. By constructing a dam at the junction of the three arms of the creek, where the passage-way was made, the entire valley could be turned into an artificial lake. But instead of one lake the plaintiff designed to make three artificial lakes in the valley for the storage of water—one where the San Andreas reservoir is now constructed, another at the location of the present Crystal Springs reservoir, and the third at the junction of the three arms of the San Mateo Creek where it forces its way through the hills. By this project the plaintiff considered it could increase its supply of water about 18,000,000 gallons daily, and be enabled to introduce the water into San Francisco, so as to reach the various levels of the city with proper pressure and upon the gravitation plan. In the scheme Pilarcitos was designed for the highest levels, San Andreas for the levels below, and Crystal Springs for the lowest levels—the final dam to be constructed on the latter levels to be at the three arms of the San Mateo Creek; and that was intended to meet the demand of the lowest levels of San Francisco.

In carrying out the project, the plaintiff, during the summer and fall of 1874, and afterward, purchased and acquired the title to 153 acres of the land bordering on the natural lake or lagoon, which is now embraced in the present Crystal Springs reservoir, and also land in the valley below and to the north of it. Of the 28 acres of the land sought to be condemned for this scheme, 7 acres are covered by the waters of the lagoon, and the whole is part of a larger tract of land, which belonged to one who, in 1874, acted as the agent of the plaintiff in making for it purchases of the lands bordering on the lagoon; but the owner was not informed that the plaintiff wanted to buy his land; nor were any steps taken to acquire the same until after it had been transferred to the San Mateo Water Company. Inferentially, therefore, the plaintiff did not consider it necessary to acquire the land in connection with the Crystal Springs scheme until after it had been transferred to another water company. Before that transfer the plaintiff had experienced no great difficulty in meeting all demands, however extravagant, for water; and at the commencement of the present proceedings it had secured other streams, water-sheds, water-rights and land, with which to meet any reasonable demands which might be made upon it in the future. Those were, in addition to Pilarcitos and San Andreas, the water, water-rights and properties which it had purchased and acquired in Lake Merced, San Francisco, Calaveras, San Gregoria, Pescadero, Clear Lake and Lake Tahoe. Of its various sources of supply the plaintiff had utilized only Pilarcitos, San Andreas and Lobos. Pilarcitos furnished 3,000,000 gallons daily, San Andreas 5,500,000 gallons, and Lobos 2,000,000; and there were over 2,000,000 gallons pumped out of artesian wells. San Francisco could have got along comfortably with 9,500,000 gallons of water daily; and if regulated by meters, 5,000,000 gallons would have been sufficient to supply the demand. One-third of the water furnished was wasted; yet the supply could have been readily increased, because Merced, at that time, had been purchased; and, according to the evidence of the Engineer of the plaintiff, "it would probably furnish, on an average, from 5,000,000 to 6,000,000 gallons a day, although, by some Engineers, it was placed at seven or eight millions; and there was testimony given by some persons, who were not experts, that it would furnish ten million gallons daily. Then there was also Calaveras, consisting of about 4,200 acres of land in Alameda and Santa Clara counties, with the water and water-rights connected therewith, for which, it was in evidence, the plaintiff had paid $1,000,000, the water from which, by means

of an aqueduct, could be emptied into the San Andreas reservoir sufficient to furnish a supply, "deducting for evaporation and everything," of from 60,000,000 to 75,000,000 gallons daily. Next to the Crystal Springs project Calaveras was the best, but the most distant and expensive. Crystal Springs was more convenient and cheaper; at the same time Calaveras alone would furnish a supply of water four times greater than Crystal Springs.

Upon the case as it was presented by the plaintiff, we cannot say that the findings of fact were not sustained by the evidence. But, assuming that they were justified by the evidence, it is contended that the finding that the land in controversy would be a great convenience and would enhance the value of the property of the corporation and secure a fuller water supply to the inhabitants of San Francisco, satisfies the degree of necessity required by the Code (Sec. 1241 C. C. P.), and is, in itself, a finding that the property is necessary to the use represented.

Such things alone, however, do not constitute the elements of legal necessity. Private property contiguously situated to the works of a corporation may be very convenient for its corporate purpose, and the acquisition of the same might add to the wealth of the corporation by enhancing the value of the property which it has in hand, and yet not be reasonably necessary to the corporation in the discharge of its duty to the public. "For public uses the Government has the right to exercise its power of eminent domain and take private property, giving just compensation; but for public convenience it has not. A public convenience is not such a necessity as authorizes the exercise of the right of eminent domain. The taking of private property for public uses is in derogation of private right, and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its condemnation are not to be extended by inference or implication." (*Prather* v. *Jeffersonville R. R. Co.*, 52 Ind. 36.) So in Illinois, where a railroad company undertook to condemn a portion of the ground used and occupied by the State under a law which authorized it "to enter upon, take possession of and use, all and singular any lands, streams and materials of every kind * * * necessary for the construction, completion, etc., of its road," the Supreme Court of Illinois used this language: "The word 'necessary' has great flexibility of meaning. It is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose. If we were compelled to say that the General Assembly intended to embrace this prop-

erty in the grant, we should hold that, as a condition to its appropriation to the uses of the company, it would have to appear that this property was indispensably necessary, not merely convenient or profitable to the road, but to its completion and operation. That without it the objects and purposes of the creation of the company would be defeated, and the company cease to exist. There can be but little doubt that this strip of ground would be of greater convenience to the company, and we entertain as little doubt that all of the grounds and buildings thereon would also be of greater convenience, to say nothing of the savings of expenditures in the purchase of land for the use of the company. But we cannot believe that it is anything more than a matter of convenience and profit that the company should apply this ground to the purposes sought;" therefore the right to condemn was denied. And in a proceeding to condemn land for a public highway where there was proof that a public road already existed between the proposed *termini*, which answered all the purposes of the public, although it had been allowed to go without repairs in violation of the duty of those who had it in charge, it was held by the Supreme Court of Louisiana that there was no necessity to take private property for the same purpose. (*Lecoul* v. *The Police Jury*, 20 La. Ann. 308.) So where on an application by a railroad company to "expropriate" lands (as it is called in Louisiana), it appeared that the company had already a sufficient quantity for its purpose, the Supreme Court held that the application should be denied. "The right of expropriation," says the Court, "should only be enforced by inches, and upon conclusive proof of the necessity upon which it rests." (*Jefferson* v. *Hazeur*, 7 *id.* 182.) Necessity is therefore not made out by proof of great convenience, nor of enhancement of values, nor of accumulation of properties of the same kind for the same use.

Unquestionably, where the object of public use is a supply of fresh water, the public have the right to an unstinted supply, and the corporation to whom has been granted the franchise to furnish the supply, has the capacity to appropriate private property for that purpose. But its capacity is limited to the real necessity which exists for the appropriation. If such a necessity exists, the individual use of property must give way to the necessity of it for the public use. But, whatever may have been the opinion and judgment of the plaintiff as to the necessity of its affairs, which moved it, in 1875, to seek to appropriate this land for the use which it represents, the necessity for appropriation was

disproved by its own showing that its utilized sources of supply were, and continued afterward to be, adequate for the public requirements, and that it was entirely practicable for it, at any time, to utilize its unutilized sources so as to increase the supply to a comparatively unlimited extent; and also by the fact that it was entirely practicable for the plaintiff to construct on its own land, just above the land of defendant, the improvement for which it seeks to condemn the defendant's land.

Utilization of the means on hand would of course incur expenditures of money; but so would the acquisition and utilization of suitable private property for the same public purpose; and it might be that the expenditures required for the former would be much greater than those required for the latter. The proofs, however, do not make out a case of financial impossibility, nor of any unreasonableness of expenditure required on the part of the plaintiff for making available its abundant resources. Indeed, it might well be inferred, from the evidence of the plaintiff, that the cost of utilizing its present resources would not measurably exceed the cost of acquiring and utilizing what it now seeks to condemn. But even if it ran beyond, and it were practicable to supply the use by the additional cost, whatever it might be, there would be no need for the plaintiff to invade private property for the same use. Necessary the property might be, under such circumstances, as a matter of economy: but necessary it would not be for the public use. A corporation in charge of such a use cannot condemn whatever it may find convenient and profitable to acquire, on the ground merely that it may save expense. On that question the following language by an English Judge—the Master of the Rolls—in *Fenwick* v. *East London Co.* (20 L. R. Eq. 544), is applicable to condemnation proceedings in our own Courts: "I think the case is concluded by the authorities. I should have thought it would have been by good sense without authority, that you cannot damage your neighbor's property merely for the purpose of saving yourself a little money, where it is unnecessary for the construction of the railway."

This being conclusive of the case, it is unnecessary to consider the other questions arising out of the record.

Judgment and order affirmed.

We concur: Thornton, J., Myrick, J., McKinstry, J., Ross, J.

(Sharpstein, J., was not present at the argument.)

IN BANK.

[Filed August 30, 1883.]

No. 8315.

SPRING VALLEY WATER WORKS

v.

SAN MATEO WATER WORKS ET AL.

By the COURT:

Upon the authority of *Spring Valley Water Works* v. *San Mateo Water Works et al.* (No. 8315),

Judgment and order affirmed.

Abstracts of Recent Decisions.

LIQUOR LAWS—CONSTITUTIONALITY—JURY TRIAL. Intoxicating liquor, seized and condemned according to law, is outlawed, is without rights, and a claimant of such liquor is not entitled to a trial by jury. (*State* v. *Intoxicating Liquor*, S. C. Vt., January Term, 1883; Reporters' Advance Sheets.)

NEGLIGENCE—RAILWAY FIRES—INSURANCE AS A DEFENSE. Where suit was brought against a railroad for damages done to cotton by fire from a locomotive, and the defense set up was that the cotton was fully insured and the policies had been collected, *held*, a demurrer to such defense was properly sustained. (*Texas etc. R. Co.* v. *Levi*, S. C. Tex., June 29, 1883; 2 Tex. L. Rev. 50.)

NUISANCE—LAYING OF WATER-PIPE—EMPLOYMENT OF CONTRACTOR. It is not a nuisance *per se* for a private citizen acting under municipal license to dig a trench in a public highway for the purpose of laying a water-pipe, and it is not such an act as renders parties engaged in it guilty of a public wrong. The entire execution of laying the pipe being committed as an independent employment to a contractor, the employer is not responsible for the mode of such execution. (*Smith* v. *Simmons*, S. C. Pa., April 16, 1883; 40 Leg. Int. 334.)

MARRIAGE — EVIDENCE — VALIDITY — INCONSISTENT DECLARATIONS. H. B., just previous to his marriage to the complainant, remarked, "I will marry you, but understand, I will never live with you." The marriage was kept secret, and H. B. and complainant cohabited together and bore children. *Held*, that this marriage was legal. That the defendant had reasonable ground to question the fact of marriage, and that the costs be equally divided between the parties. (*Brooke* v. *Brooke*, Md. Ct. App., April Term, 1883; 10 Md. L. Rec., No. 22.)

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Current Topics.

ACCOUNTING BETWEEN TENANTS-IN-COMMON.

In three leading cases our Supreme Court has considered the right of one tenant-in-common to call for an accounting from his co-tenant (the latter being in sole occupancy, but not adversely). The three cases are *Pico* v. *Columbet*, 12 Cal. 414; *Howard* v. *Throckmorton*, 59 Cal. 89, and *McCord* v. *Oakland Quicksilver Mining Company*, 12 Pac. L. J. 23.

As the matter is one of daily interest to both client and attorney, we will give the rule laid down in these cases, viz.:

"If A, one tenant-in-common, occupies the property and cultivates it, investing his own capital and labor, at his own risk, the law says he shall have the product, if he has made no contract with his co-owner; but, if he rent the property to others, he is bound to account."

One tenant-in-common must account to his co-tenant for "moneys *received* by him as rents, issues, and profits, in the ordinary acceptation of these words," but not for "moneys *made* by him, as fruits of his own industry."

LOWERING THE DIVORCE RECORD.

A divorce suit was brought recently in the Shasta Court, the complaint made out, service acknowledged, and decree of divorce entered up, all within a space of two hours. Beats Chicago.

Supreme Court of California.

IN BANK.

[Filed August 30, 1883.]

No. 8582.

MITCHELL, RESPONDENT,

v.

BECKMAN ET AL., APPELLANTS.

CORPORATION—ULTRA VIRES—STOCKHOLDERS—BANK. Action brought under Section 322 of the Civil Code against defendants as subscribers to the capital stock of a corporation doing a commercial banking business, against which plaintiff held an unsatisfied judgment. Plaintiff's money was originally deposited in a bank. Afterward an arrangement was entered into between such bank and the corporation of which defendants were stockholders, by the terms of which all the assets of the bank were assigned and transferred to the corporation, and thereupon the corporation assumed all the liabilities of the bank.

Held, as the corporation received all of the assets of the bank, which were sufficient to satisfy all the debts of the bank, as the corporation opened an account with plaintiff, crediting her with the amount in suit in her pass-book as a deposit, and paid dividends on the same for more than three years, and of which dividends defendants received their respective shares in proportion to the number of shares of stock subscribed for by them, it is too late now for the stockholders to urge the defense of *ultra vires*.

ID. To make a person an owner, it is not necessary that he should have paid for his stock. A corporation may give credit for its stock. Nor is it necessary that certificates should have been issued.

ID.—STATUTE OF LIMITATIONS. A depositor in a bank has a right to sue for a deposit upon the stoppage of payment, and not before, and it follows "as the night the day" that the right against the stockholders does not commence sooner. So, where an action is brought against stockholders within two years after the suspension of the bank, the Statute of Limitations is no bar.

ID.—SAVINGS-BANK. Conceding that an action against stockholders for a deposit in a savings-bank cannot be maintained, *held* that the corporation known as the Odd Fellows' Savings and Commercial Bank is a commercial bank, and not a savings-bank, as shown by its articles of incorporation.

PRACTICE—EVIDENCE. There was no error in admitting the judgment against the bank, there being other evidence to show the indebtedness. Objection to the relevancy is not tenable unless it is plainly apparent that the Court rested its opinion on the irrelevant testimony.

Appeal from Superior Court, Sacramento County.

Catlin & Hamburger for respondent.

G. Cadwalader and *R. T. Devlin* for appellants.

So much of the opinion of Department No. 2 (10 P. C. L. J. 742) in this cause, as follows this, is adopted as a correct exposition of the law herein:

"The complaint in this case alleges that the Odd Fellows' Savings and Commercial Bank is a corporation existing under the laws of California, ever since the 10th of February, 1875, and organized for the purpose of carrying on a commercial banking business; that the defendants are subscribers to the capital stock of the bank in amounts specified in the complaint; that on the 21st day of December, 1878, the corporation above named was indebted to the plaintiff in the sum of $6,625 72-100, upon account for so much money at and before that time had and received by the said corporation from the plaintiff to and for plaintiff's use, and at the special instance and request of said corporation, which sum said corporation thereafter, to wit, at the place and on the day last aforesaid undertook and promised to pay plaintiff when it should be thereunto afterward requested; that plaintiff has recovered a judgment against the corporation for that amount, no part of which has been paid; that the defendants were at the time such indebtedness accrued stockholders in the corporation named; that the corporation suspended all business and closed its doors on the 21st day of September, 1878, since which time it has not resumed business, etc.

"The action is brought under the statute, and the allegations in the complaint are sufficient. The case has been argued at great length and with much ability, but it does not seem to us that the points involved are of difficult solution. The main leading facts are that the corporation (the bank) was doing a commercial banking business in the city of Sacramento; that the plaintiff deposited a certain amount of money in it which has never been repaid; that the plaintiff brought an action and recovered judgment for the amount against the bank, which judgment remains in full force and effect. Whereupon plaintiff seeks to charge the defendant in this action as subscribers to the capital stock of the corporation.

"It appears, from the evidence in the case, that plaintiff's money was originally deposited in the Odd Fellows' Bank of Savings as early as the year 1873, and that on the first day of March, 1875, an agreement was entered into between the two institutions above named, by the terms of which all the assets of the last-named institution were assigned and transferred to the Odd Fellows' Savings and Commercial Bank; and, thereupon, that institution assumed all the liabilities of the former bank. It is claimed that this assumption of the liabilities of the old bank by the new one was void for several reasons. But it is sufficient for us to say, on this branch of the case, that the new bank received all of the assets of

the old, which were sufficient, as appears from the evidence of Samuel Poorman, the President of both corporations, to satisfy all the debts of the old bank. He was asked by the Court the following question: "Were all the assets transferred to the new bank, and were the assets sufficient to discharge the liability of the Odd Fellows' Bank of Savings?" Ans.—"Well, I believe they were more than sufficient. I had been President of the Odd Fellows' Bank of Savings for a considerable time before that, and was President of the Odd Fellows' Savings and Commercial Bank for nearly three years after that, and was familiar with the assets and their values." It may be added, if anything more in this connection is required, that the new corporation opened an account with the plaintiff, crediting her with the amount in her passbook as a deposit, and paid dividends on the same for more than three years. Of these dividends the defendants received their respective shares, in proportion to the number of shares subscribed for by them, and it is too late now for them to urge the defense of *ultra vires*.

"Another point made in the case is that several of the defendants never paid for the whole amount of the stock subscribed for, and never received certificates therefor. But 'to make him an owner, it is not necessary that he should have paid for his stock. A corporation may give credit for its stock as well as for any other property sold by it. Nor is it necessary that certificates should have been issued. These only constitute proof of property which may exist without them. When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract made upon a valuable consideration.' (*Chuffin* v. *Cummings*, 37 Me. 83. See, also, *Spear* v. *Crawford*, 14 Wend. 20; *The Chester Glass Company* v. *Dewey*, 16 Mass. 94; *In re* South Mountain Consolidated Mining Company, 7 Sawyer, 30; Section 322 Civil Code.)"

The Statute of Limitations is relied on by appellants as a defense. This point has been determined adversely to the contention of appellants in *Green* v. *Beckman*, 59 Cal. 545. The statute did not commence running until the bank stopped payment, which was less than two years before the commencement of the action. We cannot see how it could have begun to run sooner. There was no right of action against the bank by the express terms of the by-laws until a demand and presentation of the depositor's book. The stoppage of payment by the bank gave at once the right of

action. It had never refused payment before. It was in no default until the day indicated, when it closed its doors, and by its acts spoke as significantly as words to that effect: "We refuse to pay any one. It is useless to present your bank-book or demand, as we cannot pay." Then the depositor had a right to sue, and not before. It follows "as the night the day" that the right of action against the stockholders did not commence sooner. How could it? If on demand the bank had paid, the stockholders were discharged. Can it be maintained that there was no right of action against the bank, and still one against the stockholders? They are primary debtors, co-ordinately responsible (see *Mokelumne Canal Co.* v. *Woodbury*, 14 Cal. 265), but one is not responsible before the other.

The conclusion here reached is a fair deduction from the principles declared in the case just cited, and it is expressly stated in *Davidson* v. *Rankin*, 34 Cal. 505, that the right of action against the corporation and the stockholder accrues at the same time.

In what has been said on this point we are not to be regarded as deciding that the cause before us, as to the bar of the statute, is not within the terms of Sec. 348 C. C. P., passed in 1874, and that there is really no limitation of this action. We do not decide it, because we think it better to rest the conclusion reached herein on the grounds above expressed.

It is contended that the deposit here sued for was in a savings-bank, which was the agent of the plaintiff to invest her money, and inasmuch as it was lost through the instrumentality of her agent, she could not maintain this action against the stockholders. Conceding that this would be so, were the plaintiff's claim here sued a deposit in a savings-bank, the proof here is conclusive that the Odd Fellows' Savings and Commercial Bank was a commercial and not a savings-bank. This is plainly shown by the articles of incorporation. In these articles it is stated: "Said corporation is organized for the following-named purposes: to do a general savings and commercial banking business, to buy and sell real and personal property; to discount bills, notes and other commercial and negotiable paper and instruments; to buy and sell exchange; to receive money on deposit, with or without agreement to pay dividend or interest thereon; to borrow and loan money; to improve and lease real estate, and to do any and all acts incident to or necessary to the transaction of any and all the matters above stated." This is very different from a savings-bank. (For a definition of

a savings-bank see Grant on Banking, 546; *Huntington* v. *Savings Bank*, 96 U. S. 388; *Coite* v. *Society for Savings*, 32 Conn. 173; *Osborn* v. *Byrne*, 43 *id.* 155. See also C. C., Secs. 571–579, both inclusive.) The Odd Fellows' Savings and commercial bank had all the attributes of an ordinary commercial bank, as the articles indicate.

There was no error in admitting the judgment against the bank for which the judgment or order should be reversed. There was other evidence from the books of the banks to show the indebtedness, and because it was offered for this purpose, the objection to its admissibility is urged. The cause was tried by the Court, and when so tried, we do not understand the objection of irrelevancy is tenable unless it is plainly apparent that the Court has rested its decision on the irrelevant testimony. (*Arthurs* v. *Hart*, 17 How. U. S. 6.)

As to the number of shares owned by the defendants, we think the finding was sustained by the evidence.

We find no error in the rulings of the Court below, and the judgment and order are affirmed.

We concur: Myrick, J., Sharpstein, J., McKinstry, J., McKee, J., Ross, J.

DEPARTMENT No. 2.

[Filed August 28, 1883.]

No. 10,804.

PEOPLE, RESPONDENT, *v.* WARD, APPELLANT.

APPEAL—OBJECTION AND EXCEPTIONS TO CHARGE. Objection or exceptions to the charge of the Court must be made at the trial, and the charge set forth in the transcript.

Appeal from Superior Court, San Francisco.

Attorney-General for respondent.
Darwin & Murphy for appellant.

By the COURT:

The only points presented on behalf of the defendant are two objections to the charge of the Court. It appears from the transcript that an oral charge was given, but it does not appear that any objection was made or exception taken thereto; neither is any charge contained in the transcript. Under such circumstances we cannot see what possible error could be suggested, or why the appeal was taken, and time required to be consumed by this Court in its examination.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed August 28, 1883.]

No. 8957.

BROWN, APPELLANT, *v.* BURBANK ET AL., RESPONDENTS.

FRAUD—ANNULMENT OF CONVEYANCE. Action to annul a deed of conveyance. The plaintiff, being a grandchild of the defendants, and having resided with them since her infancy, while under their care and protection was induced to make a conveyance to them of all her property without valuable consideration. *Held*, that the deed should be annulled.

Appeal from Superior Court, Sacramento County.

W. H. Beatty for appellant.
L. S. Taylor for respondents.

ROSS, J., delivered the opinion of the Court:

Action to annul a deed of conveyance. The plaintiff's maiden name was Burbank. Her father, George W. Burbank, who died in August, 1866, when she was but nine years of age, was the son of the defendants. Plaintiff's mother died when she was but three years old. From the time of her father's death until her marriage she resided with her grandparents—the defendants—and was under their care and control. She had no other home, and was treated by them in all respects as their own child, and she regarded them as the only persons to whom she owed filial duty, or from whom she had support and protection. When George W. Burbank died, in August, 1866, he was the owner of a house and lot in the city of Sacramento. The plaintiff was left his sole heir. In October, 1866, the defendant P. D. Burbank obtained letters of administration upon his son's estate, and as such administrator took possession of the house and lot, and with his wife—his co-defendant herein—has ever since occupied a portion of the house as a residence and received the rents of the remaining portion.

In his petition for letters of administration upon his son's estate, in the inventory of the estate filed by him, and in his verified accounts filed in the Probate Court and confirmed on his petition, P. D. Burbank invariably described the house and lot as the property of the estate of George W. Burbank. He made no claim upon the property nor pretended that the estate was indebted to him. On the contrary, he charged himself in his accounts with the value of the use of that portion of the premises occupied by him, and with the rents of the remaining portion. On his peti-

tion, he was allowed the use and rents of the property for the maintenance and education of the plaintiff. The order making this allowance was made in December, 1868, and from that time until May 17, 1877, P. D. Burbank continued to enjoy the same. His administration was never closed. On the day last mentioned the property was worth $5,000, and its annual rental value was $750. It constituted the only property of the plaintiff. She was at that time nineteen years and eight months old, but was still residing with the defendants, and under their care and protection. She had never been informed by them, or either of them, of her rights with respect to the property. Such being the situation and relations of the parties, the defendant Irene H. Burbank represented to the plaintiff that the property never really belonged to her deceased father, but was rightfully and in fact the property of P. D. Burbank, and thereupon requested the plaintiff to convey it to her, promising at the same time to make a will devising it to plaintiff, so that it would be her's after the death of the grandmother. The plaintiff, acting solely upon these representations, and in obedience to the will and request of her grandmother, without other information, counsel or advice, and in ignorance of the real motive of the defendants, executed a deed conveying the property to her grandmother, the defendant Irene. The real motive of the defendants in obtaining the deed, the Court below found to be this: "The defendants claimed to be the equitable owners of the property, and were afraid that the plaintiff, who was young and giddy-minded, might marry some designing person who would deprive her and them of the property, and they desired the property conveyed to the defendant Irene, in order to prevent such a misfortune." The Court further found that at the time of the execution of the deed the defendant Irene executed a will by which she devised to the plaintiff all the property of which she might die seized.

The facts above stated are established by the findings. They show, as is well said for the appellant, "that the plaintiff, while still an inexperienced girl, still under the care and control of her grandparents, still subject to the influence acquired by them in the double relation of parents and guardians of her person and estate, accustomed to consult their wishes and obey their commands, ignorant of her rights, purposely misled and kept in ignorance by those to whom she naturally looked for the protection of her interests, without the aid of legal advice or time for reflection, made a conveyance of her whole estate without any valuable con-

sideration to one standing *in loco parentis.*" That a deed obtained under such circumstances cannot be permitted to stand is one of the clearest of propositions. (Story's Eq. Juris., Secs. 309, 317 *et seq.;* Kerr on Fraud, pages 150–1–2-3, 177–8–9; Bigelow on Fraud, pages 250–1–2–3, 263–4.)

In view of the testimony of the defendants, it is useless to order a new trial.

Judgment and order reversed, and cause remanded, with directions to the Court below to enter judgment for the plaintiff on the findings.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed August 9, 1883.]

No. 8807.

BYERS ET AL., RESPONDENTS, *v.* BOURRETT, APPELLANT.

CERTIFICATE OF PARTNERSHIP—FILING AND PUBLICATION. An action upon a contract in their partnership name cannot be maintained by persons transacting business under a firm name or designation not showing the names of the persons interested as partners in such business until they have first filed the certificate and made the publication required by Section 2466 of the Civil Code. A filing and publication after the action is brought is not a compliance with the requirements of the section.

Appeal from Superior Court, Plumas County.

H. M. Barstow and *R. H. F. Variel* for respondents.
E. T. Hogan and *W. W. Kellogg* for appellant.

MYRICK, J., delivered the opinion of the Court:

The plaintiffs, J. D. Byers and J. O. Hemler, allege themselves to be partners under the firm name of J. D. Byers & Co., and sue to recover the amount due on a promissory note executed by the defendant to them as such partners, which note was made payable to "J. D. Byers & Co."

The answer of defendant, in the nature of a plea in abatement, alleged that the plaintiffs had no right to maintain the action, for the reason that they had not complied with the provisions of Sections 2466 and 2468 Civil Code, regulating the filing and publishing a certificate of the partnership.

The case was tried on the issue thus presented, on the 15th of December, 1882, and on the same day findings were filed and a judgment rendered for plaintiffs for the amount of the note, with interest and costs.

The Court found that at the time the action was commenced the plaintiffs had not filed or published the certificate of partnership required by the sections above referred to, but that on the 7th of December, 1882, and prior to the day of the trial, the plaintiffs did file a certificate in due form, and commenced the publication thereof in a weekly newspaper, and that publication thereof had been made once before the trial; and as conclusion of law the Court held that the plaintiffs were entitled to recover.

This was error. Section 2468 Civil Code declares that persons transacting business in this State, under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, shall not maintain any action upon or on account of any contracts or transactions had in their partnership name, in any Court of this State, until they have first filed the certificate and made the publication required by Section 2466. The certificate must state the names in full of all the members of the partnership, and their places of residence, and must be published, once a week for four successive weeks, in a newspaper.

The commencement of an action is a part of the maintaining it. In this case it was incumbent on the plaintiffs to have shown that the certificate had been filed, and published once a week for four successive weeks, before the commencement of the action. We find the law very plainly written, and must hold accordingly.

The judgment is reversed, and the cause is remanded, with instructions to render judgment for the defendant; such judgment, however, not to be a bar to another action if plaintiff shall be advised to commence it after full publication.

We concur: Sharpstein, J., Thornton, J.

IN BANK.

[Filed August 22, 1883.]

No. 8927.

THE PEOPLE, EX REL. THOMAS H. HIX,

v.

BROUGHTON.

By the COURT:

The questions involved in this case are decided in *The People ex rel. Henry Stoddard* v. *A. B. Williams,* and in accordance therewith the judgment herein is affirmed.

IN BANK.

[Filed August 29, 1883.]

No. 10,811.

PEOPLE, RESPONDENT, *v.* SMITH, APPELLANT.

CRIMINAL LAW—ERRONEOUS CHARGE.

Appeal from Superior Court, San Francisco.

Attorney-General for respondent.
H. Eickhoff and *G. Strauss* for appellant.

THORNTON, J., delivered the opinion of the Court:

While the portions of the charge referred to on the argument as contravening the law would be erroneous standing alone and not qualified by other portions of the charge, yet, as the jury were told by the Court that they were "the sole judges of the facts and the value of the testimony," we cannot hold that there was any error in the charge, for which the judgment should be reversed. Taking the whole charge together, we cannot perceive that the jury were misdirected or their functions in any manner invaded by the Court. The Court did not in its comments on the credit of the witnesses go beyond what is allowable, when the jury were at the same time directed that they were the sole judges of the facts and of the value of the testimony.

Judgment affirmed.

We concur: Ross, J., McKee, J., Myrick, J.

IN BANK.

[Filed August 17, 1883.]

No. 10,830.

PEOPLE, RESPONDENT, *v.* MITCHELL, APPELLANT.

DEPOSITION—EVIDENCE. A deposition was read in evidence, against defendant's objection. In taking the deposition, the officers, so far as it appeared on the face thereof, wholly failed to comply with Sections 882 and 869 of the Penal Code. *Held*, for the informalities and irregularities apparent on its face the deposition was inadmissible.

ID. Taking the testimony of a witness on behalf of the people in a criminal case by deposition, is an exception to the rule which entitles the defendant in a criminal action to be confronted with the witness against him in the presence of the Court; and every substantial requirement of the law which authorizes it must be observed.

Appeal from Superior Court, San Francisco.

Attorney-General for respondent.
J. D. Whaley for appellant.

McKEE, J., delivered the opinion of the Court:

On the trial of this case, the Court below permitted the District Attorney, over the exception of the defendant's counsel, to read in evidence against the defendant a deposition of James Morris—the complaining witness in the case; and the ruling of the Court in that regard is the principal assignment of error.

The deposition purported to have been taken under Section 882 of the Penal Code. According to the provisions of that section the right to take the deposition of a witness, on behalf of the people, in a criminal case, arises out of the fact that the witness is unable to procure sureties for his appearance on the trial; and that fact must be satisfactorily established by the examination on oath of the witness himself or of some other person. When the fact has been judicially ascertained, the right to take the deposition of the witness may be put in motion. But the examination of the witness must be had in the presence of the defendant, or after due notice to him, and "must be conducted in the same manner as the examination of a witness before a committing magistrate is required by the Penal Code to be conducted." That is to say, the deposition must contain the name of the witness, his place of residence, and his business, the questions put to him and his answers, together with the objections, if any made, and the grounds of the objections to any of the questions or answers and the rulings thereon; and when the examination is concluded, it must be signed by the witness, or his reasons for refusing to sign stated, and the presiding Judge before whom it has been taken must sign and certify to it, if it has been reduced to writing by him or under his direction, unless the examination has been taken down by a phonographic reporter by order of the Judge, in which case, the reporter's transcript, when written out in long-hand and certified by him as being a correct statement of the testimony and proceedings, shall be received as *prima facie* correct. (Sec. 869 Pen. Code.) But the testimony of the witness is only taken conditionally. (Secs. 686, 869, *id.*), and cannot be read against the defendant until it has been "satisfactorily shown to the Court" that the witness is dead or insane, or cannot with due diligence be found within the State. (Sec. 686, *id.*)

In taking the deposition, the officers, so far as it appears on the face of the deposition, wholly failed to observe the

requirements of Section 869, *supra*, in putting the right in motion, and of Section 869, in the manner of conducting the examination. The fact that the witness was unable to procure sureties for his appearance at the trial did not appear by examination on oath of the witness, or of any other person. The deposition contained the recital that "it appears from *the statement* of William Fitzmaurice, that the witness, James Morris, was detained in jail, and was unable to procure sureties." Nowhere does it appear that the statement was made on oath. It may have been a mere verbal statement, upon which no action could have been taken. Besides, the deposition does not show that it was read over to the witness, or that he signed it after acknowledging it to be correct, or that the presiding Judge or magistrate before whom it was taken, certified to it, as he was required to do under the Code, to entitle it to be read in evidence against the defendant. For the informalities and irregularities apparent on its face, the deposition was therefore inadmissible.

Taking the testimony of a witness on behalf of the people, in a criminal case, by deposition, is an exception to the rule which entitles the defendant in a criminal action to be confronted with the witnesses against him in the presence of the Court; and every substantial requirement of the law which authorizes it must be observed. Any real departure from the course prescribed for the taking of the deposition renders the deposition itself objectionable. (*People* v. *Morine*, 54 Cal. 575; *Williams* v. *Chadbourne*, 6 *id.* 559; *People* v. *Chung Ah Chune*, 7 Pac. L. J. 700.)

Judgment reversed and cause remanded for a new trial.

We concur: Sharpstein, J., Ross, J., McKinstry, J., Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed August 28, 1883.]

No. 10,836.

PEOPLE, RESPONDENT, *v.* PERAZZO, APPELLANT.

PERJURY—FALSE SWEARING MUST BE MATERIAL TO THE ISSUE. Where the false swearing charged in an indictment or information was not material to any issue involved in the action on the trial of which it is alleged to have been committed, it could not amount to perjury.

ID. Case stated where the false swearing was not material to any issue involved.

Appeal from Superior Court, San Francisco.

Attorney-General for respondent.
C. B. Darwin and *L. Quint* for appellant.

Ross, J., delivered the opinion of the Court:

The allegations in the information upon which the defendant was convicted are that on the trial of a certain action entitled *Sherwood and Meyers* v. *Desmond* it became and was material to its determination to know whether the defendant, Perazzo, had, on or about the ninth day of September, 1880, or at any other time, loaned to M. Grossini and John Tiscornia the sum of three thousand dollars in United States gold coin; and that Perazzo on said trial testified that he did, on or about the ninth day of September, 1880, loan to the said Grossini and Tiscornia the sum of three thousand dollars in such coin, whereas in truth and in fact he did not, on or about the ninth day of September, 1880, or at any other time, make such loan or any other loan of money to the said Grossini and Tiscornia.

It is plain that the negation of the pleader cannot add to the testimony assigned as false, which is that defendant swore falsely in testifying that he loaned to Grossini and Tiscornia three thousand dollars in United States gold coin on or about the ninth day of September, 1880. If such testimony could not have been material to any issue involved in the action entitled *Sherwood and Meyers* v. *Desmond*, its falsity could not amount to perjury in law, because to constitute perjury the false testimony must be upon a matter material to the issue involved in the inquiry. *Sherwood and Meyers* v. *Desmond* was an action of claim and delivery brought for the recovery of certain articles of personal property. Upon the trial of that action the plaintiffs deraigned title through a sale under execution based on a judgment rendered in an action entitled *Perazzo* v. *Grossini and Tiscornia*, which last-named action was commenced in August, 1880, and was brought upon a promissory note for $4,000, alleged to have been executed to Perazzo by Grossini and Tiscornia. The defendant to the suit of *Sherwood and Meyers* v. *Desmond* sought to avoid the judgment in *Perazzo* v. *Grossini and Tiscornia* and the sale made thereunder, by showing that that action was founded upon a simulated note executed for the purpose of withdrawing the property of the makers from the reach of their creditors by means of the judgment and execution sale. From this statement it will be seen that in no aspect of the case of *Sherwood and Meyers* v. *Desmond*, could it have been material to inquire whether Perazzo did or did

not loan to Grossini and Tiscornia the sum of three thousand dollars at any time during the month of September, 1880, because the making or non-making of such a loan could not have effected to any extent the action of *Perazzo* v. *Grossini and Tiscornia*, the complaint in which, as has already been said, was filed in August, 1880, and was based on an alleged cause of action theretofore arising. As, therefore, the false swearing charged in the information was not material to any issue involved in the action on the trial of which it is alleged to have been committed, it could not amount to perjury, and the judgment of conviction cannot be permitted to stand. Nothing is better settled or more rational than that an indictment for one crime cannot be supported by proof of another—the crime charged must be proven. A case somewhat similar to the present one will be found reported in 9 Gray's Reports, p. 119, entitled *Commonwealth* v. *Monahan*.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed September 17, 1883.]

No. 10,865.

IN THE MATTER OF SALVATOR TROIA ON HABEAS CORPUS.

HABEAS CORPUS—BAIL IN CASES OF HOMICIDE. Where malicious homicide is charged, bail should be refused in all cases where a Judge would sustain a capital conviction if pronounced by a jury on such evidence of guilt as was exhibited at the hearing of the application to admit to bail.

Application for bail.

Holl & Buckley for petitioner.

By the COURT:

The petitioner was committed by a magistrate to answer to a charge of murder. His application is that he be permitted to give bail.

A witness, one William Rafferty, testified, at the examination before the magistrate, he saw petitioner kill his wife, under circumstances such as would constitute murder of the first degree. It is claimed that petitioner should be admitted to bail because the testimony before the magistrate, taken as a whole, shows that Rafferty swore falsely in respect to

material matters, and that his testimony should be rejected. But while there was testimony with respect to facts and circumstances which, if true, tended strongly to cast discredit upon Rafferty's statements, much of such testimony was in turn attacked and disputed. If, on *habeas corpus*, we are ever authorized to determine the credibility to be accorded to the testimony of witnesses whose material statements conflict, it is only when the testimony of the material witnesses for the people is clearly shown to be false that we can be justified in discharging the prisoner, with or without bail. It was said by the Court of Common Pleas of Philadelphia County: "It is a safe rule, where malicious homicide is charged, to refuse bail in all cases where a Judge would sustain a capital conviction if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail." (*Com.* v. *Keeper of Prison*, 2 Ashm. 227.)

We cannot say, upon the evidence before us, that the Superior Court ought to set aside the verdict, as not justified by the evidence, should the jury find the petitioner guilty of the higher degree of the crime charged. We ought not to anticipate the action of the jury by discharging the prisoner from actual custody, with or without bail, upon evidence which we are not prepared to say is so insufficient as that a verdict requiring a capital sentence—based upon it—should not be permitted to stand.

Petition denied and petitioner remanded.

(Thornton, J., not having heard the argument, expresses no opinion.)

IN BANK.

[Filed September 18, 1883.]

No. 10,886.

PEOPLE, RESPONDENT, *v.* RATEN, APPELLANT.

Appeal from Superior Court, Sacramento County.

Attorney-General for respondent.
Elwood Bruner for appellant.

By the COURT:

The questions in this case are the same as those passed on by this Court in *The People* v. *Hurtado*, No. 10,876, and on the authority of that case the order in this case fixing the day for the execution of the judgment is affirmed.

IN BANK.

[Filed August 29, 1883.]

No. 10,831.

PEOPLE, RESPONDENT, *v.* MCNUTT, APPELLANT.

CRIMINAL LAW—EVIDENCE—BURGLARY.

Appeal from Superior Court, San Francisco.

Attorney-General for respondent.
J. D. Whaley for appellant.

THORNTON, J., delivered the opinion of the Court:

The evidence of Mrs. Louisa Scott as to the jewelry which she says she lost and was stolen on the 12th of December, 1882, was clearly inadmissible. It had no proper relevancy to the burglary charged in the indictment, as committed on the 19th of the preceding month.

It is urged that no injury was done to the defendant by the ruling of the Court—that it is a case of *error without injury*. We cannot so view it. Evidence tending to prove a larceny by the defendant on the 12th of December, 1882, might well have had an effect on the minds of the jury prejudicial to the defendant.

For this error we think the cause should go back for a new trial.

We find no other error in the record.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Sharpstein, J., McKee, J., Ross, J., Myrick, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed August 29, 1883.]

No. 8875.

THE STOCKTON BUILDING AND LOAN ASSOCIATION, RESPONDENT,

v.

CHALMERS ET AL., APPELLANTS.

TRUST—PRE-EMPTION BY GUARDIAN. Section 2269 of the U. S. Revised Statutes does not permit a guardian to complete the claim of pre-emption of a deceased occupant; and a subsequent pre-emption by a guardian in his own name is not an estate in trust for the heirs.

ID.—NOTICE. Even if the guardian could be held a trustee, the plaintiff who claims under a mortgage executed by the guardian, cannot be charged with notice because of probate proceedings setting apart the premises as a homestead to the wife and children of the deceased occupant who had not completed his title from the Government.

Appeal from Superior Court, El Dorado County.

G. G. Blanchard and *W. L. Dudley* for respondent.
Irwin & Carpenter for appellants.

MYRICK, J., delivered the opinion of the Court:

This is an action to foreclose a mortgage executed by one Robert Chalmers in his life-time. His executor and executrix, and a junior mortgagee, were made defendants. Joseph and Martin Alhoff are intervenors, and, the Court, having rendered judgment against them, and directed a sale of the mortgaged premises, they have appealed. The intervention is based upon the following facts:

In 1855 one M. Alhoff went into the occupation of a small tract of unsurveyed Government land, and thence resided thereon, with his family, until his death. He extended his possessions so as to embrace some twenty-two or twenty-three acres, planted a vineyard, built a house, wine-cellar and distillery. He was qualified to pre-empt, but took no steps in that direction other than to occupy the land. He died in 1867, leaving him surviving a widow (Louisa M.) and two sons (the intervenors). In that year (1867) the place was set apart, by the Probate Court, to the widow and two sons as a homestead, and they continued to reside on the premises until July, 1869, when the said Louisa M. intermarried with Robert Chalmers, and she removed, with her sons, to the house of said Chalmers, on the other side of the road dividing the Chalmers place from the Alhoff place. In May, 1869, said Chalmers had been appointed guardian of the persons and estates of the two boys, and received letters; but he filed no inventory or report. The United States survey of the land was completed July 31, 1871. In 1871 or 1872 Robert Chalmers filed a pre-emption claim, which embraced his residence on the east side of the road, as well as the east 9 13-100 acres of the Ahloff place, and in August, 1873, he received a United States patent for the same. On the 27th of September, 1874, said Chalmers deeded to Louisa M. and the two boys the westerly 13 19-100 acres of the Alhoff place, retaining the title to the easterly 9

13-100 acres, on which were located the dwelling, barn and a portion of the wine-cellar. On the same day he executed the mortgage in suit, which embraced the easterly 9 13-100 acres and his own residence, with other property—but did not embrace the westerly 13 19-100 acres. In January, 1879, said Chalmers moved to the Alhoff house, and resided there until his death in 1881. In March, 1879, said Robert Chalmers executed the second mortgage to his son, the defendant Hugh Chalmers. The intervenors attained majority, respectively, Joseph on the 17th of September, 1878, and Martin on the 21st of November, 1879.

The intervenors claim that, by virtue of the homestead proceedings in the Alhoff estate, they became tenants-in-common with their mother in the ownership of the premises; that when Chalmers acquired the title from the United States Government, he acquired it for them, and thence held in trust for them; and that the possession by their father, and the setting apart by the Probate Court, imparted to the plaintiff sufficient notice to put it upon inquiry, and that it is not an incumbrancer in good faith without notice.

Section 2269 of the Revised Statutes of the United States makes it competent for the executor or administrator of the estate of the deceased occupant, or one of his heirs, to file the necessary papers to complete the claim, and procure a patent by which the title shall inure to the heirs. Mrs. Alhoff was the administratrix of her deceased husband's estate, and was an heir; in either capacity she could have perfected her husband's claim, if he had any. At his death, he had no title; the title was in the United States; he was a mere occupant; the only right beyond his bare possession of the tract was the right of pre-emption after survey, by himself, or, if dead, by his representatives. When the land had been surveyed, no person took any step on behalf of the Alhoffs. Chalmers, as guardian of the sons, was not named in Section 2269 as being permitted to make the pre-emption. The Government of the United States permitted Chalmers to pre-empt the land, and gave him its patent.

An attempt was made to show that Chalmers had applied the rents and profits of the Alhoff place to payment to the Government for the land; but the evidence given and offered failed to be sufficient to establish a *prima facie* case.

We may add, upon the subject of notice, that even if Chalmers could be held to be a trustee, there would not be sufficient to charge the plaintiff with notice of the fact. At the time of the probate proceedings to set apart the homestead, the Alhoffs had no title except occupation; the land

was Government land, and subsequently the Federal Government granted it to Chalmers. The plaintiff was not put on inquiry as to any claim of the intervenors.

Judgment and order affirmed.

I concur: Sharpstein, J.

I concur in the judgment: Thornton, J.

DEPARTMENT No. 2.

[Filed August 29, 1883.]

No. 8853.

HUGH CHALMERS *v.* GEORGE CHALMERS ET AL.

By the COURT:

This case is similar to that of *The Stockton Building and Loan Association* v. *Chalmers*, No. 8875, except this is to foreclose the junior mortgage.

For the reasons given in the opinion in that case, the judgment and order in this case are affirmed.

DEPARTMENT No. 2.

[Filed August 9, 1883.]

No. 8886.

GREEN, RESPONDENT, *v.* ROBERTSON, APPELLANT.

1. ACTION—WHEN NOT PREMATURELY BROUGHT. The defendant agreed to pay the plaintiff $400 for his services in finding a purchaser for his lands, "when such payment [the purchase-price of the land] is made by Tucker" (the purchaser.) *Held*, That the $400 was due as soon as the purchase-money was paid, and that an action could be maintained without waiting a day.
2. BROKER ACTING FOR BOTH PARTIES—PUBLIC POLICY. *Held*, That the defense that it is against public policy for a broker to act for both parties to the sale, is not well made in this case.

Appeal from Superior Court, Amador County.

A. C. Brown for respondent.

C. R. Gray for appellant.

STATEMENT.

The defendant sought to defeat the action by showing (1) that the plaintiff acted in the double capacity of agent and employé of both defendant (the seller) and Tucker (the purchaser), under an agreement for pay from each, and without the knowledge of the seller or purchaser that he was acting for both, and that the instrument sued on was therefore null and void because against public policy; and, (2), that the action was prematurely brought, inasmuch as the complaint alleges "that the said John Tucker *has paid* to the defendant," etc., which is equivalent to an admission that he had paid on the day that the action was brought, the defendant having the whole of that day to pay.

MYRICK, J., delivered the opinion of the Court:

This action was brought to recover judgment for $400 and interest on the following instrument:

"JACKSON, Cal., March 17, 1882.

"I hereby agree and promise to pay unto William O. Green the sum of four hundred dollars, for and in consideration of services to me rendered by him in finding a purchaser and selling my ranch to John Tucker, when the said Tucker or his assigns pays to me the balance of the purchase-price, to wit: the sum of twenty-six hundred dollars, and when such payment is made by said Tucker, then I agree to pay the said $400 to said William O. Green.

"JAMES ROBERTSON."

In addition to the averments of execution of the instrument, plaintiff averred that the balance of the purchase-price, $2,600, had been paid by Tucker to the defendant.

The defendant admitted the employment and services, the execution of the instrument, and that the balance of the purchase-price had been paid.

The plaintiff was entitled to judgment on the pleadings. Neither of the defenses was sufficient to prevent recovery.

First—As soon as the money was paid by Tucker, the defendant owed the $400 to plaintiff, and plaintiff could maintain his action without waiting for the day to expire. The instrument does not say, "On the day Tucker pays me I will pay the plaintiff;" but it says in effect, "When he pays me, I will pay."

Second—The matters set up in the answer, as to the employment of plaintiff by Tucker, do not constitute a defense. The plaintiff made no bargain for the sale of the property: he was not authorized to make a bargain; he undertook to bring the buyer and seller together, and he did so; they

made their own bargain; and, after plaintiff had rendered his service and brought them together, and after they had made their bargain, the defendant executed the instrument in suit. There is no pretense that the defendant is not satisfied with the price he received; no pretense that Tucker is not satisfied with the price he paid.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, J.

IN BANK.

[Filed September 18, 1883.]

No. 10,867.

PEOPLE, RESPONDENT, v. HURTADO, APPELLANT.

CRIMINAL LAW—EXECUTION—APPEAL. The ruling of the Court below overruling defendant's objections to an order fixing the day for execution of death sentence, is not appealable.

ID.—VERDICT. A verdict in case of homicide, "We, the jury, find the defendant guilty of murder in the first degree as charged," is valid.

ID.—CONSTITUTION—INFORMATION. The provision of the present Constitution as to the prosecution of criminal offenses by information is not in conflict with the Constitution of the United States.

Appeal from Superior Court, Sacramento County.

Attorney-General for respondent.
McFarlane & Jones for appellant.

By the COURT:

The ruling of the Court overruling the objections of defendant to the order fixing the day of execution, is not appealable.

Every question urged on the argument of this appeal was disposed of on the former appeal. Moreover, the verdict of the jury was sufficient and regular. (*People* v. *Welch*, 43 Cal. 174.) And further, the provision of the Constitution of this State as to the prosecution of criminal offenses by information (Sec. 8, Art. I) is not in conflict with the Constitution of the United States. (*Kalloch* v. *The Superior Court of the City and County of San Francisco*, 56 Cal. 229.)

The order fixing the day for the execution of the judgment is affirmed.

IN BANK.

[Filed September 21, 1883.]

No. 10,819.

PEOPLE, PLAINTIFF, *v.* MARKHAM, DEFENDANT.

BRIBE—POLICE OFFICER. A police officer who receives money in consideration of his promise not to arrest any one of a class of offenders against the criminal laws is guilty of receiving a bribe, and it is not necessary to allege in the information or prove at the trial that some person or persons did subsequently commit the crime, and that the officer, having the opportunity, failed to arrest such person or persons.

EVIDENCE—IMPEACHMENT OF WITNESS. When it is sought to impeach a witness, and the inquiry is as to his reputation for truth, honesty and integrity, the answer must be as to his *general* reputation. What a witness' reputation is among the police officers of San José does not establish his general reputation.

PRACTICE—APPEALABLE ORDER. The order denying defendant's motion in arrest of judgment is not appealable.

Appeal from Superior Court, Santa Clara County.

J. H. Campbell, District Attorney, for plaintiff.

T. H. Laine for defendant.

MCKINSTRY, J., delivered the opinion of the Court:

The charging part of the information is as follows: "The said W. W. Markham, on the 30th day of December, A. D. 1882, at the county and State aforesaid, then and there being an executive officer, namely, a police officer of the city of San José, county of Santa Clara, aforesaid, did ask, receive, and agree to receive, a bribe, to wit, fifteen standard dollars, lawful coin of the United States of America, upon an understanding and agreement that he would not arrest persons engaged in violating Section 330 of the Penal Code of the State of California, nor would he arrest persons engaged in violating the gaming ordinance of the said city of San José, contrary to the form of the statute," etc. Defendant demurred to the information on the ground "that said information is uncertain in that it cannot be ascertained therefrom whether he is charged with making a corrupt agreement not to arrest under Section 330 of the Penal Code, or for a violation of a city ordinance."

A defendant cannot demur to an information on the ground that it is uncertain. (Pen. C. 1004.)

It is contended by appellant, however, that the facts stated in the information do not constitute a public offense.

Section 1012 of the Penal Code provides: "When the objections mentioned in Section 1004 appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to the jurisdiction of the Court over the subject of the indictment or information,

or that the facts stated do not constitute a public offense, may be taken at the *trial*, under the plea of not guilty, or after the trial, *in arrest of judgment*."

At the proper time defendant moved an arrest of judgment on the ground that the information did not state facts constituting a cause of action. He also moved for a new trial.

Section 68 of the Penal Code reads: "Every executive officer * * * who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years," etc.

The seventh section of the same Code defines the word "bribe" to signify anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given or accepted, with a corrupt intent to influence unlawfully the person to whom it is given in his action, vote or opinion in any public or official capacity."

The objection of appellant's demurrer is more specifically stated in his points filed in this Court. "There was nothing (in the information) to show that anything ever could or did come before him in his official capacity concerning the matter."

If we understand the argument of counsel, it is to the effect that the information should have stated that Section 330 of the Penal Code was being violated by certain persons when the fifteen dollars was given and received, with the understanding that defendant should not arrest such persons, or that when the money was paid it was paid in contemplation of an intended violation of the section by certain persons, and was received under an agreement of defendant that he would not arrest such persons. Further, that in case the information had alleged that Section 330 was being violated when the money was paid, it should also have alleged that defendant in fact failed to arrest the persons guilty of such violation. At the least, the argument of counsel for appellant involves the proposition that in case the information alleges that money is paid a police officer, and by him received, with the understanding that he will not arrest persons who subsequently shall commit a certain crime, it must also allege that some person or persons did subsequently commit the crime, and the officer, having the opportunity and ability to arrest, failed to arrest such person or persons.

But we think when a police officer receives money in consideration of his promise that he will not arrest any one of

a class of offenders against the criminal laws, he is guilty of receiving a bribe, because the case of one who has committed the offense, and the consequent duty of the officer to arrest, is "a matter which *may* be brought before him in his official capacity." We are of opinion that a police officer who shall receive a weekly stipend, or a single payment of money, in consideration of his promise not to arrest any violator of the gaming law, is not only morally guilty, but may be found guilty under the *statute*, without his trial involving the necessity of the prosecution establishing the commission of a distinct crime by a third person, together with a want of energy and efficiency on the part of the officer in securing the arrest of the third person.

The scope of the definition of bribery is as broad as the duties of the officer who accepts the bribe. It is the duty of a police officer to arrest, with or without warrant, according to circumstances, every person who violates Section 330 of the Penal Code. If, therefore, he agreed, in consideration of money paid him, not to arrest any person who should violate Section 330, it would seem to the ordinary comprehension that he was bribed with respect to a matter which might be a subject of his official action.

In opposition to the view above set forth appellant cites certain cases. They are: *People ex rel. Purley*, 2 Cal. 564; *Barefield* v. *The State*, 14 Ala. 603; *Collins* v. *The State*, 25 Texas (Supplement) 202; *The State* v. *Hughes*, 43 Texas, 518; *Newell* v. *Commonwealth*, 2 West Va. 88, and *Old* v. *Commonwealth*, 18 Grat. 918.

But the decision in *People ex rel. Purley* turned upon the phraseology of a statute different from that now under consideration. It was held that under the statute of 1850, which confined the offense of bribery of a judicial officer to the payment or offer to influence such officer "to act more favorably to one side than the other in a suit, matter or cause, or *pending* or *brought* before him," it should appear that a particular legal proceeding named in the presentment was commenced, or, at least, was to be commenced.

In *Barefield* v. *The State*, the defendant below had been indicted for bribing a Justice of the Peace by corruptly promising him $25 to influence his decision in a certain controversy or proceeding that might be brought before him, wherein Miles Barefield was to be plaintiff and W. H. Owen was to be the defendant.

Two of the three Judges of the Supreme Court of Alabama held that while anoffer to bribe a judicial officer was a grave offense at the common law, yet under the statute (sim-

ilar to ours) it was necessary, to constitute the bribery, that there must have been an acceptance of the bribe, and, also, it must appear that the cause or proceeding was pending before the Justice when the offer was made, or that the cause or proceeding was afterward instituted, so that in the ordinary course it would come before him. Mr. Justice Chilton dissented from his brethren upon both the points on which their conclusion rested, and we concur with his view of the law. He said: "But I feel constrained to differ with my brethren, as to the construction which they place upon the statute under which the conviction was had. In my judgment, it is not indispensable that the matter, cause or proceeding, in which the decision or judgment of the officer is to be influenced by the bribe, should afterward be actually brought before him, in order to constitute the offense. But if the party corruptly give, or promise any gift or gratuity whatever, '*with intent to influence* the act, vote, opinion, decision or judgment' of any officer, whether executive, legislative or judicial, on any matter, cause or proceeding, which may be then pending, *or may by law come or be brought before him in his official capacity*, the crime is complete, although the matter never should come before such officer. The law, it is well remarked, abhors the least tendency to corruption; and at common law, attempts to bribe, though unsuccessful, were held indictable. (1 Russell on Crimes, 156; *United States* v. *Warrall*, 2 Dall. 185; *Rex* v. *Plympton*, 2 Ld. Raym. 1377; *Rex* v. *Vaughn*, 4 Burr. 2494; affirmed in *Rex* v. *Pollman et al.*, per Lord Ellenborough, 2 Camp. 230.) It is true, the intention to corrupt the Justice, in regard to his anticipated action upon the case, is not an offense which the law can punish: but when that intention is evidenced by overt acts—when the promise is complete to confer upon the officer the reward, as a premium to incline him to act contrary to his duty, and in violation of the known rules of honesty and integrity, the defendant has done his part toward consummating the guilt, and the punishment inflicted is not disproportioned to the demerit of his crime. The matter, cause or proceeding must be one which *may* come before him—that is, comes within his jurisdiction, or which may be brought before the officer, or which may be pending at the time of the corrupt promise. The Legislature, I think, did not intend that the prosecution should depend upon the fact whether the officer actually had it in his power to carry out the corrupt agreement before the indictment was exhibited. It is sufficient, I think, that the subject-matter upon which the bribe was to operate existed, and could legally be brought before the

officer in his official capacity. The offense consists, in contemplation of the statute, in poisoning and corrupting the fountain of justice, and although the particular deleterious consequences designed to be effected by the parties has not ensued, the State, nevertheless, has an officer corrupted, and society has lost all protection for its rights, so far as the administration of the law by him is concerned."

In *The State* v. *Hughes*, the defendant was indicted under a statute which made it a felony to bribe a witness. It was held that a charge that the defendant offered a person money to avoid becoming a witness was not authorized by the working of the statute. In *Newell* v. *Commonwealth*, decided in 1795, it was said that a common-law information which attempted to allege that defendant, a Justice of the Peace, corruptly received a bribe to vote for a certain person as Clerk of the Peace, and that he did vote for such person, was too uncertain in not averring that an election for Clerk of the Peace was in fact held. In *Old* v. *Commonwealth* the only question considered was whether the evidence justified the verdict of guilty. It was held that a new trial was properly denied. In *Collins* v. *The State* (25 Texas, Supplement), the indictment, founded upon a statute, omitted to state that the matter, to influence his action upon which it was alleged money was offered to the District Attorney, was a matter of such nature as ever could come before him for official action.

None of the cases cited, when analyzed, would require a construction such as is claimed by appellant to be the correct construction of the section of our Code. The nearest case is *Barefield* v. *The State*, and of that case we remark that the reasoning of the dissenting Judge is to us more satisfactory than that of the prevailing opinion.

Here the duty of the defendant was to arrest those violating a certain law, and the duty was one which he might at any time be required to discharge. The matter might be presented to him for official action. The 67th section of the Penal Code provides that any person who gives or offers a bribe to any executive officer, with intent to influence him in respect to any act, etc., as such officer, is punishable. By the 67th section the offense defined is that of one who *offers*, by the 68th that of one who *receives*, a bribe. If the witness who testified he paid money to the present defendant was informed against, would it not be enough to allege in the information that he paid the money in consideration of a promise that the officer would not arrest any person for a violation of Section 330 of the Penal Code? His offense

was complete. In the language of Mr. Justice Chilton, "the Legislature did not intend that the prosecution should depend upon the fact whether the officer actually had it in his power to carry out the corrupt agreement before the indictment was exhibited." (See, also, *People* v. *Ah Fook*, 6 Pac. C. L. J. 1021.) *People* v. *Kalloch* (11 Pac. C. L. J. 86) in no degree conflicts with the views above expressed.

At the trial a witness, *Cole*, was asked by defendant's counsel: "Do you know Ah Hung's reputation for truth, honesty and integrity in San José?" Ah Hung had been examined as a witness on behalf of the prosecution. To the question above recited, the witness Cole answered: "I know his general reputation among the officers of San José—that is all." On objection, the answer was ruled out by the Court.

A witness may be impeached by evidence that his general reputation for truth, honesty and integrity is bad. (C. C. P. 2051.) The section of the Code as to reputation for *truth* is but declaratory of the common-law rule. The evidence, to be competent, must be as to witness' general reputation in the community in which he resides—that is to say, to impeach him when the inquiry is as to his reputation for truth, he must have reached the bad eminence of notoriety as a liar. (4 Cush. 167; 17 Wall. 586; Wharton on Ev. 562–3.) The attack must be on his reputation amongst his neighbors, whether they know him personally or not, or amongst those who have had opportunities of ascertaining his reputation as generally estimated. (1 Green. Ev. 461).

The question propounded to the witness was not as to the general reputation of Ah Hung, and the answer of the witness did not respond to any supposed question as to general reputation. The number of police officers in San José is, for aught that appears in the transcript, very limited, and there is no suggestion that Ah Hung's acquaintances and associates were confined to members of the police department. However this may be, if we assume, as we must assume, that there are few policemen in San José, their opinion of his character does not establish his general reputation in the community.

Read as a whole, the charge of the Court below fairly presented the law.

The order denying defendant's motion in arrest of judgment is not appealable.

Judgment and order denying new trial affirmed.

We concur: Ross, J., Sharpstein, J., Myrick, J., McKee, J., Thornton, J.

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Current Topics.

A NOVEL CASE.

A noteworthy case is the colored boy's action for compensation for furnishing blood, by the operation of transfusion, to the defendant when he was asphyxiated. This case is an apt illustration of the way in which every step in the progress of applied science gives rise to new questions. It was said that the action was for goods sold and delivered, and this may not have been an inappropriate form for the pleader to resort to; but it is curious to observe that the novelty of the relation of the parties involves different legal elements. The defendant was asphyxiated and could neither order goods nor request services, nor call a physician who might act as his agent in so doing. Nor did he have any opportunity, on recovering consciousness, to reject the service or return the goods. But these circumstances and others, although they might be regarded as taking the case out of the category of "goods sold," do not necessarily affect the meritorious character of the claim nor deprive it of a legal foundation.

The case is more like those of services rendered in an emergency, where even voluntary assistance, if followed by a recognition of its value and a promise of reward, has been held to give a legal right.—Cent. L. J.

LAWYERS' CLOTHES.

"The Chicago Legal Adviser denounces the 'present disgusting style of short coats' worn by lawyers. We concur: anything connected with a suit that is short should be disgusting to the professional mind." (Alb. L. J.)

We reply to the Adviser, "Thou canst not say, we do it" The California lawyer wears his coat long, too long. The excuse most prevalent is his limited number of suits.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed August 28, 1883.]

No. 8663.

THE PEOPLE'S SAVINGS BANK, APPELLANT,

v.

HODGDON, RESPONDENT.

DEFENSE—JUDGMENT IN EJECTMENT—AFTER-ACQUIRED TITLE. Title of anterior date, acquired intermediate the joining of issue in an action of ejectment and the entry of the judgment therein, is not affected by the judgment if not set up by supplemental pleadings.

Appeal from Superior Court, Sacramento County.

Freeman & Bates for appellants.
O'Brien, Hodgdon and *Holl* for respondent.

Ross, J., delivered the opinion of the Court:

Action to quiet title. It is conceded on both sides that one Gass was the owner in fee of the property in controversy on the 29th day of June, 1855. Being such owner, he, on the 17th day of December, 1858, mortgaged the property to Morse & English, trustees, etc. April 21, 1863, a complaint was filed for the foreclosure of the mortgage, and the proceedings were regularly conducted to judgment, under which the property was duly sold by the Sheriff on the 6th of July, 1863, to Morse & English, who received a certificate of purchase, which, in the year 1869, they assigned to Laidley, Hickox & Dale.

After the execution of the mortgage to Morse and English, and on the 22d of November, 1860, Gass conveyed the property by deed to Jane Griffin, who thereupon entered into its possession. In the year 1868 the present defendant Hodgdon commenced an action of ejectment against Jane Griffin and other persons to recover the possession of a block of land including the land here in question. In that action Jane Griffin, on the 13th of July, 1869, answered, denying that Hodgdon had any right or title to this land, and alleging herself to be the owner in fee thereof. This answer was filed prior to the execution of the Sheriff's deed to Laidley, Hickox and Dale pursuant to the sale made under the decree of foreclosure of the Gass mortgage. The Sheriff's deed was, however, executed subsequently in the same year—that is to say,

in the year 1869. In 1870 Laidley, Hickox and Dale executed to Jane Griffin a deed conveying the said property to her. In 1872 the ejectment suit of *Hodgdon* v. *Griffin et al.* was regularly tried upon its merits, and judgment was rendered therein in favor of Hodgdon and against the said Griffin and others for the recovery of the land involved therein, including that here in controversy, under which judgment Jane Griffin was dispossessed and Hodgdon placed in possession.

The single question in the present case is whether Jane Griffin, and her co-plaintiff, who claim, under her, are concluded by the judgment rendered against her in the ejectment suit.

When Hodgdon commenced his action of ejectment, and when Jane Griffin filed her answer therein, the legal title to the property in controversy was in Jane Griffin, because of the deed executed to her by Gass. The title was, however, subject to be divested by the culminating step in the foreclosure proceedings, to wit, by the execution of the Sheriff's deed. The title was so divested in the year 1869. When Laidly, Hickox and Dale received the deed from the Sheriff they took the title as of December 17th, 1858—the date of the mortgage by virtue of which the foreclosure proceedings were had. (*McMillan* v. *Richards*, 9 Cal. 412.) They thus became vested with the legal title to the property as of a date anterior to the deed from Gass to Jane Griffin and anterior to the ejectment suit of Hodgdon; and not being parties to that suit, they were of course unaffected by it. They could, therefore, undoubtedly have asserted their title against both Hodgdon and Jane Griffin. In 1870 they conveyed their title to Jane Griffin. It is true that that conveyance was made intermediate the filing of her answer in the ejectment suit and the trial of the action, but the title she got by the conveyance was not the same title she had when the suit was commenced and when her answer was filed; for the title she had at those dates was subject to the mortgage, and therefore subject to be, as it was, divested by the execution of the Sheriff's deed in pursuance of the sale made by virtue of the decree of foreclosure; the title she got by the deed from Laidley, Hickox and Dale conveyed to her the absolute fee of the property as of date December 17, 1858, unaffected by any subsequent conveyance or action. This title Jane Griffin did not hold at the time she joined issue in the action brought against her by Hodgdon, but it was acquired by her intermediate that time and the entry of judgment in that case, and was not set up by supplemental answer. It was, therefore,

not involved in that action, and was, therefore, unaffected by the judgment therein rendered. (*Valentine* v. *Mahoney*, 37 Cal. 396; *Thompson* v. *McKay*, 41 Cal. 221; *Bagley* v. *Ward*, 37 Cal. 121.)

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed September 21, 1883.]

No. 9180.

GRADY, PETITIONER,

v.

THE SUPERIOR COURT OF FRESNO COUNTY.

CONTEMPT—FINE—EXECUTION—HABEAS CORPUS. For a contempt committed in the presence of respondent, petitioner was adjudged to pay a fine of $100, and in default of such payment to be imprisoned one day for each dollar of the fine. After imprisonment following default, petitioner was, on *habeas corpus* before a Superior Judge in another county, discharged from custody. *Held*, such discharge from the imprisonment portion of the judgment did not operate to prevent respondent from subsequently enforcing the collection of the fine by execution against the petitioner's property. (Penal Code, 1214.)

Review.

W. D. Grady for petitioner.

By the COURT:

It is admitted that the Superior Court had jurisdiction of the proceedings for contempt. That being the case, and the Court having imposed a fine, it was competent for the Court to enforce its collection by execution. (Sec. 1214 Pen. C.)

As to that portion of the order adjudging the petitioner guilty of contempt, which directed that imprisonment should be used as a means of collecting the fine imposed, it is sufficient to say that Section 1487 of Penal Code makes it the duty of the Court or Judges to whom a writ of *habeas corpus* is returned, in case it shall appear that the petitioner is in custody by virtue of process from any Court, Judge or officer, and that the jurisdiction of such Court, Judge or officer was exceeded in adjudging that the petitioner should be imprisoned, to discharge the petitioner. Section 1496 of the same Code declares that no person who has been dis-

charged by the order of a Court or Judge on *habeas corpus* can be again imprisoned, restrained or kept in custody for the same cause, except in certain specified cases, of which the present is not one. We think that the adjudication of the Superior Judge on *habeas corpus* that the judgment of the Court, in adjudging that the petitioner be imprisoned was in excess of its jurisdiction (upon which followed the consequence that the petitioner could not again be imprisoned for the same contempt), was in effect an adjudication (which the Judge on *habeas corpus* had full power to make), that the portion of the contempt judgment which provided for such imprisonment, was null and void. This leaves the judgment of the Superior Court, in the contempt proceeding, as imposing a fine only, and places the case within Section 1214 Penal Code.

We wish it to be distinctly understood that we express no opinion with respect to the correctness of the judgment of the Superior Judge on *habeas corpus*. His view of the law is not authority binding upon any other Judge or Court, should the same question arise in another case upon the same or similar facts.

The application for a writ of review is denied, and the order to show cause is discharged.

(Thornton and Sharpstein, JJ., express no opinion.)

IN BANK.

[Filed August 29, 1883.]

No. 8636.

CARROLL, RESPONDENT, *v.* BELDEN, APPELLANT.

CONFLICT OF EVIDENCE.

Appeal from Superior Court, Yolo County.

W. B. Treadwell for respondent.
Roche & Desbeck for appellant.

By the COURT:

There is a substantial conflict in the evidence regarding the understanding of the parties as to the transactions involved in this case. Therefore we will not disturb the findings of the Court below.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed August 28, 1883.]

No. 8901.

WILSON, APPELLANT, *v.* WILSON, RESPONDENT.

APPEAL—HOW THE OPINION SHOULD BE MADE A PART OF THE RECORD. When a conclusion of law is legitimately drawn from the facts, anything occurring at the trial which by law is not made a part of the judgment-roll which shows that the decision is erroneous, must be brought into the record by a bill of exceptions. So where the appellant did not except to the opinion of the Court, nor move upon any grounds of law or fact for a decision by the Court upon what he considered the principle of law applicable to the case, nor resort to any of the modes known to the law for making the opinion a part of the record, the opinion will not be considered on the appeal.

Appeal from Superior Court, Sacramento County.

Grove L. Johnson, *Henry Edgerton* and *Robtert T. Devlin* for appellant.

Freeman, *Bates* and *Hart*, for respondent.

McKEE, J., delivered the opinion of the Court:

In this case the only issue presented to the Court for trial and determination was, whether a transaction which took place between the parties on the 26th of November, 1875, was intended as a mortgage or a conditional sale. By its finding, filed pursuant to Sections 632–33 C. C. P., the Court decided that the transaction was a conditional sale, and gave judgment for the defendant. The finding was made upon conflicting evidence, but the evidence was sufficient to sustain the finding, and the finding was sufficient to sustain the judgment.

It is contended, however, that the facts found did not warrant the conclusion drawn from them, and that the judgment entered thereon is erroneous. This contention is not founded upon the record of the case; for while the notice of motion for a new trial designated, as ground upon which the motion would be made, that "the decision is against law," the specification of error is that "the Court erred in rendering judgment for defendant, because the opinion of the Court shows conclusively that the judgment should have been in favor of plaintiff."

This specification concedes the facts as found by the Court; and as the Court found that the deed and agreement in writing, executed by the parties, on the 26th of November, 1875 (which the plaintiff alleged were intended and un-

derstood as a mortgage to secure an indebtedness due by him to the defendant) were not intended or understood by the parties thereto, or either of them, to be, or to constitute a mortgage to secure any sum whatever, and the same did not constitute a mortgage," it necessarily followed, as a conclusion of law, that the defendant was entitled to judgment, and the plaintiff was not. Judgment was therefore properly entered for the defendant, upon a conclusion of law legitimately drawn from the facts found.

Where a conclusion of law is not legitimately drawn from a finding of facts, it may be reviewed without a bill of exceptions. (*Thompson* v. *Hancock*, 51 Cal. 116.) Such an error, if it exist, is apparent upon the judgment-roll. But if the conclusion be legitimately drawn from the facts as found, there is not, in that regard, any error apparent on the judgment-roll; and if anything has occurred, on the trial and determination of a cause, which shows that the decision by the Court was erroneous, and is not made by law part of the judgment-roll, it must be brought into the record of the case by a bill of exceptions. If it is not made part of the record by a bill of exceptions, or by some other mode sanctioned by law, it is not reviewable by the appellate Court.

Here the matter or thing to which the appellant objects is an opinion delivered by the Court below, in rendering judgment which, it is contended, shows that the Court reached its conclusion by the erroneous application of a principle of law to the evidence in the case. But the appellant did not except to the opinion, nor did he move, upon any grounds of law or fact, for a decision by the Court upon, what he considered, the principle of law applicable to the case; nor did he resort to any other mode known to the law for making the opinion part of the record. In *Touchard* v. *Crow*, 20 Cal. 163, the Court said: "If counsel, when a case is tried by the Court without a jury, desire to present for consideration certain points of law as applicable to the facts established, *or sought to be established*, upon which the Court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows." And in *Griswold* v. *Sharpe*, 2 Cal. 24, it is said: "In all cases where the Judge below tries the facts of a case, the proper mode of reserving the questions of law arising upon the facts, is to ask the Court to decide the law as counsel may desire; and upon a refusal, to have it noted in the bill of exceptions."

Neither that course nor any other known to the law was taken to make the opinion, or the alleged principle upon which it was based, part of the record in the case. The opinion has therefore no place in the record, and cannot be considered. (*McClory* v. *McClory*, 38 Cal. 575; *Hidden* v. *Jordan*, 28 *id.* 305; *Houston* v. *Williams*, 13 *id.* 24; *People* v. *Reynolds*, 11 Pac. L. J. 570.)

Judgment and order affirmed.

We concur: Ross, J., McKinstry, J.

IN BANK.

[Filed September 21, 1883.]

No. 9056.

SMITH, PETITIONER, *v.* DUNN, RESPONDENT.

CONSTITUTION—EXTRA COMPENSATION—SALARY OF REPORTER OF DECISIONS. The Act to pay the salary of the Reporter of Decisions of the Supreme Court for the period elapsing from January 7th to July 1, 1880, upon a basis of $2,500 annually (Statutes 1883, p. 292), is constitutional. For such period the salary of petitioner had not been fixed, provided for, or paid; and the Act does not allow *extra* compensation within the prohibition of the Constitution.

Mandamus.

Geo. H. Smith in P. P.

Attorney-General for respondent.

McKEE, J., delivered the opinion of the Court:

By an Act of the Legislature entitled "An Act to pay the salary of the Reporter of Decisions of the Supreme Court for the period elapsing from January 7 to July 1, of the year 1880," the sum of $1,208.33 was appropriated out of any moneys in the State Treasury, not otherwise appropriated, to pay to the petitioner the salary due him for services as such reporter during the time specified. The Act took effect on the 13th of March, 1883. Appropriation of the sum allowed by the law has, in fact, been made, and the money is now in the State Treasury for the purpose of the law; but the Controller of State refuses to draw his warrant for it in favor of the petitioner, because, as it is contended, the law conflicts with Sec. 32, Art. IV of the Constitution, which prohibits the Legislature from granting any *extra* compensation or allowance to a public officer, and also Sub. 9, Sec. 25, Art. IV, which

prohibits special legislation affecting the salary of any officer. But there is nothing in the title, or the body of the Act which expresses an intention to increase or diminish the salary of the officer, nor to appropriate money to him as extra compensation for official services. The entire scope of the Act, as expressed in the title and in the Act itself is to fix and provide for the payment of the salary of the officer for the time specified in the Act. Legislation for that purpose is not prohibited by the Constitution, unless the salary itself which constituted the subject of legislation, had been already fixed, provided for, or paid. If it had been, then the allowance of any additional sum for the same purpose would be in the nature of extra compensation, and the Act allowing it would be unconstitutional and void. But the salary of the plaintiff for the time specified in the Act had not been fixed, provided for, or paid. The facts are: On the 7th of January, 1880, the petitioner was appointed Reporter of the Decisions of the Supreme Court. As such he qualified and entered upon the duties of his office. By the Constitution of the State, under which the appointment was made and accepted he was to receive a salary "not to exceed $2,500 per annum, payable monthly, (Art. VI, Sec. 21). In dealing with that provision the Legislature passed an Act fixing the salary at $2,500 per annum, the constitutional limit, and that sum was appropriated for the payment of the annual salary; but the Act did not take effect until July 1, 1880; there was therefore an interim during which the salary had not been provided for by law. But the plaintiff was entitled to his salary during that time, because when he entered into office he consented to the terms proposed by the State as to his compensation, *i. e.*, that he would receive a salary not exceeding $2,500 annually, payable monthly; and there arose such a legal relation between him and the State as gave him a public right to have his compensation fixed, within the constitutional limit, by legislative enactment. And when the Legislature did, by the Act of 1880, fix the annual salary of the office and provide for its payment, except as to the time of nearly six months, which had intervened between the date of the appointment to the office and the taking effect of the law, there still remained a portion of the salary, due for that time, for which the plaintiff had a valid and subsisting claim against the State, and for the payment of that claim the Legislature was authorized, by Section 29, Art. IV of the Constitution, to make an appropriation. The Act of 1883 was passed for that purpose, and we find in it nothing which conflicts with any of the provisions of the Constitution.

Smith v. *Kenfield* (57 Cal. 138) is not opposed to the views expressed or the conclusion reached in this case. In that the facts were not the same or similar. The case is therefore inapplicable.

Let the writ issue.

We concur: Myrick, J., Sharpstein, J., Thornton, J.

I concur in the judgment: Ross, J.

CONCURRING OPINION.

I concur in the judgment. When the Legislature fixed the salary of the Reporter he became entitled to demand and receive compensation at that rate from the commencement of his term so soon as the Legislature should appropriate moneys for that purpose. By the Act of March 13, 1883, moneys were appropriated for the payment of his salary from the commencement of his term to the date when the Act fixing his salary took effect. McKINSTRY, J.

IN BANK.

[Filed September 22, 1883.]

No. 5110.

L. F. MOULTON, PLAINTIFF AND RESPONDENT,

v.

W. H. PARKS, ELI DAVIS, W. H. PERDUE, A. B. VAN ARSDALE, G. W. SANTEE, GEORGE OHYLER, JAMES T. LEARY, JOHN DOE AND RICHARD ROE, DEFENDANTS AND APPELLANTS.

PRACTICE—SUPPLEMENTAL PLEADINGS—EMINENT DOMAIN—CONSTITUTION. Action brought against Parks, Davis, Perdue, Van Arsdale, Santee, Ohyler, Leary, *John Doe* and *Richard Roe*, to enjoin them from further maintaining and continuing a certain dam constructed in 1874 in *Colusa* County and for damages caused plaintiff by its erection. The dam was first built by the defendant Parks under a contract awarded to him and under plans adopted by the Supervisors of Sutter County and the engineers of Levee District No. 5, which had been created under the provisions of the Act of the Legislature of March 25, 1868. Defendants Perdue, and Van Arsdale and Davis were members of the Board of Supervisors and participated in the said proceedings. After the commencement of the action the dam was swept away. The Court found that subsequently Swamp Land Reclamation District No. 226 was created under the Act of March 28, 1868, with defendant Parks as a trustee, and the defendants Davis, Ohyler and Leary were members of the Board of Supervisors, and that the trustees of said district, caused the dam to be rebuilt and continue to maintain it. Judgment below enjoining all the *defendants* and for costs and damages.

HELD 1. The persons sued by the fictitious names of John Doe and Richard Roe are not bound by the judgment—the pleadings not having been amended showing their true names, and they having failed to answer.

2. The judgment against defendants Obyler and Leary should not stand. They had no connection with the erection or maintainance of the dam prior to the action. If the subsequent rebuilding connected them with the original unlawful act there should have been a supplemental pleading setting forth the facts.

3. The defendants were not entitled to defend under the Act of March 28, 1868—they having failed to *plead* the facts by supplemental answer.

4. The judgment against defendant Davis should be set aside because, (1.) there are no *supplemental pleadings* to charge him as a member of the Board of Supervisors at the time of rebuilding the dam; (2.) the finding that when the contract with Parks was made "Van Arsdale, Perdue and Davis were members of the Board of Supervisors and *participated in the proceedings*" is not sufficient to support it.

5. The findings in no way connect Santee with the unlawful act, and the judgment against him should be reversed.

6. Conceding that the incidental damage caused by a public work authorized by law prior to the adoption of the Constitution of 1879 is *damnum absque injuria*, the judgment against Parks is valid, (1) because the work was not authorized by the Act of March 25, 1868. That Act gave no power to the Board of Supervisors of *Sutter* County to estalish Levee Districts in *Colusa* County, (2) the Act is unconstitutional.

7. The judgment against Perdue and Van Arsdale is affirmed because they aided and abetted Parks in his unlawful act by entering into the contract with him.

Appeal from Superior Court, Colusa County.

Belcher & Belcher and *Vanclief & Croden* for respondent.
Creed Haymond and *A. L. Hart* for appellants.

MCKINSTRY, J., delivered the opinion of the Court:

In his complaint plaintiff alleges "that he is ignorant of the true names of the defendants above designated as John Doe and Richard Roe, and therefore has thus designated them, and prays that when their true names are discovered the pleadings and proceedings herein may be amended by inserting such names in the place instead of the names herein used to designate such defendants."

The "defendants" filed an answer.

The record does not show that the true names of the defendants designated in the complaint as John Doe and Richard Roe have been discovered, nor have the pleadings and proceedings herein been amended by substituting any names for the fictitious names. Did the complaint not show that the names John Doe and Richard Roe were fictitious names, we might hold perhaps that the persons, whomsoever they were, who appeared and answered as John Doe and Richard Roe were bound by the judgment—they having failed to plead the misnomer or to respond in their real

names, to the allegations made against them. But as the record reads we construe the answer to be the answer of those of the defendants sued by their proper names, to wit: W. H. Parks, Eli Davis, W. H. Perdue, A. B. Van Arsdale, G. W. Santee, George Ohyler and James T. Leary, and the injunction as operative only against such persons, their servants, etc.

The complaint was filed January 13, 1875.

It avers that the plaintiff now is, and for more than two years last past has been, the owner and in possession of a tract of land, containing 158 acres, situated in the County of Colusa, which tract is specifically described; that the land has been held and possessed by plaintiff for farming, grazing and fruit-growing purposes, and is of the value of $5,000 for such purposes; that plaintiff has and for more than a year past has had on said land a dwelling-house, usually occupied by plaintiff's tenants and employés, about one-half mile of fence, a well, corrals, and an orchard of fruit-bearing trees, of the value of $800.

The foregoing allegations of the complaint are denied by the answer, but the Court below found them to be true, and the evidence is not before us.

The complaint further avers that plaintiff's land is situated between Butte Creek and the Sacramento River, above where Butte Slough puts out of said river, that said slough puts out of said river below plaintiff's land, less than a mile therefrom, and running in a southeasterly direction to the mouth of Butte Creek, flows thence in a southerly direction to and into said river, at a point more than twenty miles south of and below plaintiff's land; that Butte Creek rises and has its source more than forty miles northeast of plaintiff's land, and flows in a southwesterly direction, and into Butte Slough at a point on said slough about two and one-half miles southeast from plaintiff's land; that Butte Creek and Butte Slough from their point of confluence with each other, and the said Butte Creek from a point at least twenty miles northeast of plaintiff's land, to such confluence, flow through a basin of low land, which basin is bounded on the west by a strip of high land from one to three miles in width, extending along the east bank of the Sacramento River, from a point on said river about thirty miles above and north of where said Butte Slough puts out of said river to a point where said slough enters said river, and on the east by the high lands adjacent to the Butte mountains, and the high lands along the west bank of the Feather River—which said basin has an average width of about two miles;

that during the winter and spring months in each and every year large quantities of water flow through said basin, slough and creek, filling their banks in said basin and overflowing the same, and the waters from the Sacramento River above said high land find, by natural means, their way into said basin, so that the water flowing into and in said basin, during said months, is in volume double that of the main Sacramento River at any point opposite said basin, and said waters are discharged through said creek, slough and basin into the Sacramento and Feather Rivers more than twenty miles south of and below plaintiff's land.

The answer admits the allegations of the complaint last set forth, except that the defendants deny that Butte Slough runs to the mouth of Butte Creek, or into the Sacramento River at any point; deny that Butte Creek runs into Butte Slough, or that there is any junction or confluence of said creek and slough, "except that both run into the same large basin of tule and swamp lands;" alleged that the water flowing into or through the basin described in the complaint, is in volume not more than *one tenth* of the water of the main Sacramento, and deny that the waters of the basin described in the complaint, or any part thereof are discharged into the Sacramento or Feather River, through said creek or slough at any point south of the head of said slough.

The Court found, that Butte Slough runs to the mouth of Butte Creek, and flows thence in a southerly direction "to and into the tules of Sutter county" at a point more than five miles south of and below plaintiff's land; that Butte Creek flows into Butte Slough at a point on said slough about two and one-half miles southeast of plaintiff's land; that Butte Creek and Slough from the point of their confluence flow through the basin described in the complaint, and discharge their waters into the said "tules of Sutter County," and that in the winter and spring months the waters flowing to and in said basin are in volume about equal to that of the main Sacramento at points opposite said basin.

Thus the finding of the Court accords with the last recited allegations of the complaint, except that the Court finds that, after their junction, Butte Creek and Slough flow into the tules of Sutter county, instead of finding that Butte Creek and Slough flow into the Sacramento and Feather Rivers, as alleged in the complaint.

It is averred in the complaint, and admitted by the answer, that the Sacramento River is a navigable stream from the town of Red Bluff, in the County of Tehama, a distance

of seventy miles above and north of plaintiff's land, to its mouth, and from said town to said land and slough flows nearly due south; that opposite the basin described in the complaint, the banks of said river are from ten to twenty feet higher than the banks of Butte Creek where said creek flows through said basin.

The complaint further alleges that plaintiff's land is part of the said strip of high land lying on the east bank of the Sacramento River, and, during the winter months of every year, is at times partially overflowed by the waters of said Butte Creek, and by the waters of the Sacramento River, that find their way into said basin as aforesaid, but such overflow is slight, and does not interfere with the use and enjoyment of said land for the purposes for which it is owned and possessed; that said land is relieved from said overflow by the flowing off of said waters through said basin, creek and slough, which constitute the natural and only outlet for said water; that if said slough, creek and basin remain open and the slough and creek unobstructed, the flood-waters of each years will be drained off before any injury is done to said land of plaintiff or the improvements thereon.

The answer denies these last averments. The Court found as alleged by plaintiff, except that it found a *portion* only of plaintiff's land was part of the high land on the east bank of the Socramento.

The plaintiff further pleads: That *defendants* on the 17th day of October, 1874, unlawfully and wrongfully raised, constructed, and ever since have maintained a *dam* across said basin below and within about two miles of plaintiff's land and upon the freehold of defendants, that said dam extends from the high lands on the east side of said basin to the high land on the west side thereof, and crosses said Butte slough and Butte creek at points one-fourth of a mile above and north of their confluence, and is of sufficient height, length and strength to dam up and entirely obstruct, and does dam up and entirely obstruct said creek, slough and basin, and prevents the flow of any of said waters through the same at and below said dam, and has since its construction and before the commencement of this action, caused the waters that flow upon plaintiff's land as aforesaid to remain thereon, and the waters which naturally, and which but for said dam would flow through said basin, creek and slough without damage or injury to plaintiff's land, to back up, overflow and remain upon plaintiff's land, to his damage in the sum of one thousand dollars.

The answer denies that either of the defendants ever built the dam, except as in the answer subsequently admitted, and

expressly denies that the dam has obstructed the creek, slough, or basin, or that it caused any water to flow or remain upon plaintiff's land, or that, by reason of the dam, plaintiff has sustained any damage.

The Court found that the dam dammed up and obstructed the said creek, slough and basin, and did cause the waters flowing upon plaintiff's land to remain thereon for a *greater length of time* than they would have remained except for said dam.

The plaintiff, in his complaint, further alleges that the defendants intend to, and will, unless prevented by the judgment of the Court, forever maintain said dam at its present height, length and strength, and will forever by it dam up and obstruct said creek, slough and basin, and prevent the flow of any of said waters; that if defendants so maintain and so obstruct the flow of said waters, the waters that flow upon the land of plaintiff as aforesaid, will remain thereon, and the waters will back up and overflow said land, flood plaintiff's dwelling house, wash away and destroy his fences, fruit trees, and other improvements, deposit injurious sediments, etc. These averments are denied by the defendants.

Plaintiff's prayer is for an injunction, damages and costs.

The defendants further allege in their answer that, in the spring of 1871, in pursuance of an Act of the Legislature entitled "An Act to provide for the protection of certain lands in the county of Sutter from overflow," approved March 25, 1868, defendant, W. H. Parks, together with other persons not parties to this action, claiming in good faith to be the owners and in possession of over 60,000 acres of land in the county of Sutter, subject to overflow, petitioned the Board of Supervisors of said county, in accordance with said Act of the Legislature, to set apart and erect into a levee district "a specified portion of said county," with defined boundaries, of which the said lands of the petitioners constituted more than one-half the acreage, and to place such levee district under the provisions of the Act of the Legislature and in accordance therewith, as "Levee District No. 5," in said county. That such proceedings were regularly had, that on or before the first day of June, 1871, said portion of said county containing over 100,000 acres of land, in one body, was duly, by said Board of Supervisors, erected into a levee district and placed under the provisions of said Act, and called "Levee District No. 5." That before the 15th of August, 1871, said Levee District was duly and in good faith organized by the election and qualification

of all such officers as are provided for by said Act. That continually, ever since the said petitioners, the Board of Supervisors and all the officers of said district have in good faith claimed that said district was duly organized under said Act, and that it became thereby a municipal corporation in fact; that the District, by its officers, has in good faith claimed the same to be such corporation; and, as such, has assessed the property of the District, levied and collected taxes, adopted plans for the protection of said District from overflow, contracted and paid for a large amount of work in pursuance of such plans, issued warrants and bonds for large sums of money, which are outstanding and unpaid, and done all other acts which said Levee District might lawfully have done.

That a part of one of the plans adopted by said Board of Supervisors and the Engineers of said District, to protect said District from overflow, was the building of the dam or levee complained of. That the contract for said dam or levee, according to specifications fixed and prescribed by said engineers and Board of Supervisors, was awarded to defendant, W. H. Parks, and duly executed by him on the 23d day of July, 1874. That defendant Parks, with his servants, built said dam or levee in exact accordance with said contract and specifications, and that none of the other defendants assisted or participated in the building thereof. That defendants *Perdue* and *Van Arsdale*, as members of said Board of Supervisors and *ex-officio* Directors of said Levee District, signed said contract for the building of said levee (called dam in the complaint), that defendant, Parks, completed said levee according to said contract, and the same was accepted by said Levee District, and Parks discharged from further obligations on said contract, long before the commencement of this action.

Defendants further answered that, after the commencement of this action, and on the —— day of January, 1875, said dam or levee was wholly abated and removed.

The Court below found that a petition in due form, was presented by defendant Parks and others not parties to this action, for the formation of a Levee District, as alleged in the answer and under the act referred to, that petitioners were the owners of more than one-half of the lands described in the petition, that on the 11th of March, 1871, the Board of Supervisors duly made and entered an order as required by law, erecting said lands into "Levee District No. 5." That the building of the dam was part of the plan adopted. That on the 23d of July, 1874, the Board of Su-

pervisors, in pursuance of the act, made and entered into a contract with the defendant, Parks, for the construction of the dam described, that at the time of the presentation of the petition and the making of said order and the taking of the other proceedings, the defendants, Perdue, Van Arsdale, and Davis, "were members of said Board of Supervisors and participated in the proceedings hereinbefore set forth."

That in pursuance of said contract, defendant Parks constructed on lands of said defendant and others, a dam across said basin, creek and slough, within about two miles of plaintiff's said land; that said dam was constructed from the high lands on the east side of said basin to the high lands on the west side thereof, crossing said creek and slough at points *about one-fourth of a mile above and north of their confluence;* that said dam, as constructed, was of sufficient height, length and strength to dam up and obstruct, and did dam up and obstruct said creek, slough and basin so as to prevent, "except, through a gate, culvert and waste way respectively," the flow of any of the waters of the same at and below said dam, and did cause the waters flowing upon plaintiff's land as aforesaid, to remain thereon for a greater length of time than they would have remained had it not been for said dam; that said dam was constructed by said Parks in the summer and fall of the year 1874.

That on the 19th of January, 1875, and after the commencement of this action, the said dam was broken by the pressure and force of the waters standing above and north thereof, and about 600 feet of said dam was then washed and carried away by said waters, the land above said dam, including plaintiff's said land, being thereby relieved from overflow, the water causing said overflow finding an outlet through the break in said dam.

The Court also, at the request of defendants, adopted certain findings to the effect following:

That the object of the dam or levee was to reclaim and protect from overflow by water the swamp and overflowed lands within the District No. 5; that the dam or levee was built in strict accordance with plans and specifications made by the engineer of District No. 5, and the contract of defendant Parks with said District through its proper agents, and was completed pursuant to said contract, and accepted by said District, before any injury resulted therefrom to plaintiff; that the *basin* referred to annually fills and overflows from the waters of the Sacramento River and Butte Creek to a depth that renders a portion of plaintiff's said land unfit for cultivation; and has so overflowed every year

for more than twenty years, except the year 1864; and the largest proportion of the water, filling said basin, flows from the Sacramento River over its banks and through Butte Slough; that said basin fills as the river rises, and empties, if unobstructed, as the river falls.

That on the 26th day of November, 1874, the said dam backed the waters up and over the plaintiff's land, and caused the same to remain thereon until the 19th day of January, 1875, and that by said dam, plaintiff has been damaged in the sum of one hundred dollars.

Such were the issues made by the pleadings, and such the findings of the Court so far as they responded to such issues.

The cause was tried in the District Court in January, 1876, and the Court, *in addition* to the findings above set forth, found in substance as follows: That after the break in the dam, and after this action was commenced, certain lands in Sutter County were formed and created into a Swamp Land Reclamation District, designated as Swamp Land Reclamation District, number two hundred and twenty-six, under and in pursuance of an Act of the Legislature entitled "An Act to provide for the management and sale of lands belonging to the State, approved March 28, 1868, and the defendant W. H. Parks, was thereupon duly elected one of the Trustees of said Reclamation District, and he then and there qualified and acted as one of said Trustees. That at the time of the formation of said Reclamation District, the defendants Davis, Ohyler and Leary were the duly elected, qualified and acting Supervisors of the said county of Sutter, and have ever since constituted the Board of Supervisors of said county.

That the Trustees of said reclamation district, the defendant Parks being one of them, afterwards and in pursuance of a plan of reclamation by them adopted, made and entered into a contract with one——for the repair of said dam, and in pursuance of the said contract the said——in the summer and fall of 1875, did repair said dam by rebuilding so much thereof as had been previously washed away as above stated, and did at the same time enlarge and stengthen the whole of said dam; so that the same as repaired, enlarged and strengthened the whole of said dam; so that the same as repaired, enlarged and strengthened is sufficient to dam up and obstruct the said waters as aforesaid. That the said Trustees of said reclamation district ever since—the defendant Parks being one of them—have had their agents and employes upon said dam protecting and maintaining the same.

That unless restrained the said Trustees will continue to

maintain said dam and to keep the same in repair, and will forever thereby dam up the waters flowing through said creek, slough and basin, so as to overflow and remain upon plaintiff's said land as aforesaid, and thereby to cause the waters to remain upon a portion of plaintiff's land for a period of at least six weeks longer each year than they otherwise would.

The judgment appealed from *enjoins the defendants*, their servants, etc., from constructing, maintaining, etc., and provides that plaintiff recover of defendants $100 damages, and $369 10 *costs*.

The findings were all filed at the same time, but, for convenience of reference, we shall style those first herein before set forth as the "original findings," and those stated to have been filed in *addition*, as the "additional findings."

The additional findings, except in so far as they are evidence of an intent on the part of defendant Parks to continue the dam, are entirely without the issues, and cannot uphold a judgment against the defendants, Ohyler and Leary. If it be conceded that the original erection of the dam was unlawful, and that Parks, Perdue and Van Arsdale, (the two last by reason of their having signed the contract with Parks) were parties to such unlawful erection, all others who aided or assisted in the work, and all who, after it was erected, either before or after the commencement of the action, aided or assisted in continuing or repairing the dam, as agents, servants, employes or co-workers with the persons who constructed it, would of course be bound by the judgment and restraining order against Parks, Perdue and Van Arsdale, by virtue of their connection with and relation to the defendants last named. But plaintiff ought not, under the pleadings in this action, to have a judgment for damages and costs against Ohyler and Leary, who had in no way interfered with his rights, or assisted others in interfering with his rights, prior to the commencement of the action. It is found that defendants Ohyler, Leary and Davis were members of the Board of Supervisors when a "Reclamation District" was formed under the Act of March 28, 1868, and when the Trustees of such Reclamation District let the contract for the rebuilding of the dam, in pursuance of a plan by them adopted. But if the establishment of the Reclamation District so connected the defendants Ohyler, Leary and Davis, with the rebuilding of the dam—such rebuilding being conceded to be unlawful—as that they would be held to be parties to the rebuilding, the establishment of the Reclamation District was a new and independent act on the part of Ohyler,

Leary and Davis, in no way connected with the previous formation of a Levee District (No. 5) under the Act of March 25, 1868, or with the erection of the dam thereunder; an act which occurred after the commencement of this action, and no supplemental or amended complaint was filed under which they could be tried for such subsequent act. Plaintiff was not authorized to take a judgment for damages and costs against those who, as we have seen, if they did him any wrong, did it after suit brought, without supplemental pleading; *a fortiori*, when it appears they are acting officially and independently in accordance with an act of the Legislature different from the Act under which the original wrongdoers claim to justify.

And even if it should be conceded, that, in consequence of the fact of Ohyler and Leary having been members of the Board of Supervisors when the "Reclamation District" was formed, etc., they should be held as the servants or coworkers of the persons who originally built the dam in maintaining and continuing it, and therefore bound by any injunction which should issue against such persons, yet, in the absence of supplemental complaint, charging them as such co-workers, and giving them an opportunity to deny the charge, no judgment for damages and costs should have been entered against them.

The judgment is therefore erroneous as to defendants Ohyler and Leary.

On the other hand, the other defendants were not entitled to defend under the Act of March 28, 1868. If it should be conceded that the original erection of the dam was unlawful, nevertheless if the Act of March 28, 1868, is a valid act, and the dam was rebuilt in strict pursuance of that Act, the defendants would have been entitled to assert the facts, (although the rebuilding was done after the suit was brought) by way of defense, to show that the dam ought not to be *abated, or its continuance enjoined*—had they *pleaded* the facts by supplemental answer. But they failed to do so.

Hence, under the pleadings neither was plaintiff authorized to take a judgment against defendants Ohyler, Leary and Davis, based upon the fact that they were members of the Board of Supervisors when certain things were done, subsequent to the commencement of the action, nor can defendants rely as a defense upon the establishment of a "Reclamation District" under the Act of March 28, 1868, after the commencement of the action.

The answer avers that defendants Perdue and Van Arsdale, as members of the Board of Supervisors and, *ex-officio*,

Directors of Levee District No. 5, signed a contract for the building of the dam by defendant Parks. Whether the admission that they signed the contract makes them responsible is a question hereafter to be considered. But there is no finding in the "original" findings which can be held to charge either the defendant Perdue, or Van Arsdale, or Davis. The finding is, that, when the petition was presented by Parks and others, when the order was made by the Board of Supervisors erecting "Levee District No. 5," and when the contract was made with Parks, "Van Arsdale, Perdue and Davis were members of said Board and participated in the proceedings." *Non constat*, but at least one of the three voted against the reception of the petition, againt the order erecting the District, and against the order, if any, directing the contract to be executed. The finding fails to state who of the three favored the proceedings.

There are therefore, no facts found, which can uphold the judgment against the defendant *Davis*.

The judgment against the defendant *Santee* is clearly erroneous. The findings in no way connect Santee with any of the acts claimed to be wrongful.

It remains to inquire whether the judgment against Parks, Perdue and Van Arsdale should be permitted to stand.

As we have seen, the Court below found that the dam or levee was built in strict accordance with plans and specifications made by the engineer of District No. 5, and the contract.

It may be conceded for the purposes of this decision, that if the Legislature had power to pass the Act of March 25, 1868, and that Act was pursued by the Supervisors and other officers whose duties are prescribed by it, and the dam was a work which they had authority to erect under the Act—the plans by them adopted and carried out not being inherently defective or violative of the law—the present action cannot be maintained; that under such circumstances, any incidental damage which may have occurred to plaintiff in the prosecution or completion of a public work authorized by the State is *damnum absque injuria*. (*Green* v. *Swift*, 47 Cal. 536.)

The present Constitution of the State provides: "Private property shall not be taken or *damaged* for public use without just compensation having been first made to, or paid into Court for the owner." (Art. I, Sec. 14). The Constitution of 1849 read—"Nor shall private property *be taken* for public use without just compensation." (Art. I, Sec. 8).

The dam was erected, and the case at bar tried by the District Court while the former Constitution was in force.

In *Green* v. *Swift*, (*supra*), it was held that the incidental damage caused by a public work authorized by law in flooding or washing away of the soil from the land of a citizen—the work having been done in strict accordance with law, skilfully and without malice—was not a taking of private property within the meaning of the Constitution then in operation. We have repeatedly intimated that we would follow the construction of the provisions of the former Constitution given by the highest tribunal created by that Constitution. And it may be conceded, for the purposes of this decision only, that the doctrine of *Green* v. *Swift* is applicable to the facts of the present case.

It is proper to inquire whether the erection of the dam or levee found to have damaged the plaintiff's land was authorized by the Act of March 25, 1868.

The land within the *delta* above the junction of Butte Creek and Butte Slough is in Colusa County. (Pol. Code, 3916.) The Court below found that the dam, so constructed, extended from the high lands on the east side of the basin to the high lands on the west side thereof, crossing said creek and slough at points about one-fourth of a mile above and north of their confluence. The portion of the dam between the creek and slough was, therefore, in Colusa County.

The Act of the Legislature under which defendants Parks, Perdue and Van Ardale seek to justify is entitled "An Act to provide for the protection of certain lands in the county of Sutter from overflow." (Stats. 1867–8, p. 316.) By its term it confers power on the Board of Supervisors of Sutter to establish Levee Districts only within the limits of their county. (Secs. 2, 21.) The Board of Supervisors are authorized to adopt a plan for the protection of any Levee District created under the Act, to divide it into sections, and to let contracts for the construction of sections of a levee or other work of protection. (Sec. 10.) The power to adopt a plan is not in term limited to the adoption of a plan which shall provide for the construction of levees or other works only within Sutter County; nor is the power conferred upon the Board to contract for the construction of levees without the county, unless such power is conferred by the general terms of the grant. It may be that, in the opinion of the Board of Supervisors of Sutter County, no efficient plan for the protection of Levee District No. 5 could be carried into effect which did not provide for the construction of a levee outside of the District and outside of the county, and it may be argued that such a condition of things must have been anticipated by the members of the Legislature, when the

general power of adopting plans, and constructing works in accordance therewith, was given to the Board.

But the Board of Supervisors of Sutter county had the right to employ only such power, with respect to the adoption of plans and construction of works as was conferred by the Act of the Legislature, and in inquiring whether the grant is limited we should consider as well the whole Act as the nature of the official powers, under the Constitution and laws, of the Supervisors, as legislative and executive public agents.

The eighth section of the Act empowers the Board to take possession of any land *within the district* that may be necessary for any levee or work of reclamation. It also empowers the Board to take possession of any land outside the district and within the *county* that may be necessary or proper to furnish *material* for the construction of a levee, or other work of protection, within a district. The same section requires that if the property, within the district or county, of which possession may thus be taken, is private property, the Board shall petition the County Judge of the County of *Sutter* to appoint three appraisers, etc. It may be conceded that the private proprietor may voluntarily surrender possession and waive damages, and that the power to condemn includes the power on the part of the county to accept lands, within the district or county, thus donated for the purpose of a levee, or for the purpose of the taking of of material therefrom. There is no power conferred by the Act upon the Board of Supervisors to contract for the purchase of lands for a consideration, or to levy an assessment to provide moneys to pay for lands thus purchased. It would seem that it was not within the contemplation of the Legislature that lands should be acquired whereon to erect levees or works of protection, or from which to take building material, except through the employment of the power of eminent domain (within which is included the acquisition by means of donations, which are operative by reason of the waiver of "just compensation" on the part of the private proprietor), and, as we have seen, the employment of the power of eminent domain through the Supervisors is carefully limited to the *district*, where the land is taken for a levee, and to the *county* where it is taken for material.

This view is strengthened by a consideration of the nature of the office of Supervisor. They are local officers. The Act imposes the duty of keeping the levees and other works in repair, and of levying and collecting taxes upon all the property within the district for the purpose of raising funds

to keep them in repair. If the Supervisors of Sutter have power to cause to be erected and kept in repair a levee, or part of a levee, in Colusa, they have power to erect and keep in repair levees, all but one of which shall be in other counties than Sutter. It is not to be supposed that legislators closed their eyes to the complications between counties and property owners in different counties which would thus arise. Again, if the Board of Supervisors are authorized to include within its levees large bodies of land not within the district, the effect may be a direct benefit to such lands, or portions of them, by protecting them from overflow. But the lands within the limits of the district only can be assessed for benefits conferred upon *such lands*. The Legislature has no power to relieve a portion of the lands benefited. (*People* v. *Lynch*, 51 Cal., 15.) It may be said that the facts of this case do not show any of the lands without the district, to be benefited by the work. But we are now considering the interpretation to be given the Act of March 25, 1868, and may reasonably presume that the Legislature did not intend that the power to adopt plans and build levees should be employed in such manner as to result in consequences which might be obnoxious, because violative of constitutional principles. (*People* v. *Parks*, 8 P. C. L. J., 219.) The establishment of an assessment district is a declaration that the only lands which will be benefited by the proposed protection works, are the lands within the district. It must be admitted it was not intended the Board should include within levees land without the district which should be benefited by the work. It will be urged, however, that the Board has power to determine that lands without the district are *not* benefited by the levees, and to include such lands within the district levees; that it is to be presumed the Board had the limitation in mind, and that the levees as actually erected did not include any lands *benefited* other than the lands within the district. But whence comes the power to the Supervisors of determining (after the creation of the district which itself determines that certain lands and none other will be benefited by the proposed work), that any lands—inside or outside the district—will be or will not be benefited? The argument would lead to this: By creating a levee district, the Supervisors adjudge that the lands within the district will be benefited by work to be done at any places outside the district which the Board shall subsequently provide for—the Board reserving the entire power, by its final and conclusive judgment, of deciding that any plan it may adopt will not include any lands which will be benefited, other than

the lands within the district. In view of the other sections of the statute, the nature of the functions of Supervisors, and the consequences which might follow from the adoption of the construction claimed by connsel for appellants, we ought not, in the absence of any provision of the Act conferring on the Board the power of extending their works beyond their county, to hold that such vast discretionary authority has been conferred on the Supervisors, merely because of the clause which authorizes them generally to adopt plans, etc.

Our conclusion is that the officers of the county of Sutter had no power to cause a levee to be built in the county of Colusa.

We add that there are constitutional objections to the Act of March 25, 1868, not heretofore considered by the Supreme Court.

The twenty-first section of the Act is mandatory. It reads:

"Sec. 21. Whenever a petition shall be received by said Board of Supervisors from persons in possession of more than one-half of the acres of any specified portion of said county, asking to be set apart and erected into a levee district, said Board *shall at once erect* such territory into a levee district, and place it under the provisions of this Act, to be called Levee District Number Two, Three, and so on, as the case may be; *provided*, that it shall not be required to submit the question of tax to a vote of the people of any district so erected."

Here is an attempt to transfer to persons in possession of more than one-half of the acres, of any portion of the county of Sutter which *they* may specify, the power to declare that such portion of the county will be benefited by works to be erected at the expense of all the property, real and personal, within it, and to set in motion machinery for the enforcement of a tax and assessment against the owners of the minority of the acreage. The Act provides for no judicial inquiry as to what lands will be benefited by a prposed work, nor does it contain any declaration by the State Legislature that any specified lands will be benefited, nor provide that such declaration may be made by the Supervisors, or by any officer or agent of the State or county. When those in possession of more than half of the land by them specified file a petition they assert that *they* will be benefited by the proposed work, and they also attempt to determine that the owners of other lands will be benefited. They determine that the work will benefit all, and attempt to levy a tax upon others as well as

themselves, which shall be expended in work of *joint* as well as *several* benefit. No man can be a Judge in his own cause, and no man's property can be taken without due process of law.

With respect to assessments for local improvements, Mr. Justice Cooley says: "The district within which the tax shall be laid may be determined in either of two modes: 1. The Legislative authority either of the State, or, when properly organized, of the municipality, may determine over what territory the benefits are so far diffused as to render it proper to make all lands contribute to the cost; or, 2. The assessors or commissioners who, under the law, are to make the assessment, may have the whole matter submitted to their judgment, to assess such lands as in their opinion are specially benefited and ought therefore to contribute to the cost of the work." (On Taxation, 449.)

It is manifest that the Act of the Legislature we are considering does not provide for the creation of an assessment district in either of the two modes above pointed out. Under the twenty-first section, if valid, the levee district, which is the assessment district, is established neither by the legislative authority of the State or county, nor by Assessors or Commissioners authorized to ascertain what lands will be benefited by the proposed levees or works of protection. The section provides that on the presentation of a petition the Board of Supervisors "shall at once proceed" to erect the territory described in the petition into a levee district, "and place it under the provisions of this Act." The Supervisors have no discretion to reject the petition, or to modify or change the boundaries of the district, or otherwise to exercise any judgment with reference to the expediency of fixing the limits of the assessment district where the petition fixes them. One man in possession of three thousand acres of land which he believes will be protected by a levee may thus decree that 5998 acres (of which 2999 are owed by one hundred other men) will be benefited by a levee, and arbitrarily adjudged the one hundred to pay almost half of the expense of building it. Under our Constitution, there never has been power in the Legislature to delegate such legislative functions to interested individuals.

By entering into the contract with defendant Parks for the construction of the levee the defendants Perdue and Van Arsdale aided and abetted the former in his unlawful act.

The judgment against defendants Parks, Perdue and Van Arsdale should be affirmed, against Santee, Ohyler, Davis and Leary should be reversed.

Ordered, that the judgment of the District Court be modified by reversing and setting aside so much thereof as adjudges that plaintiff have and recover of and from defendants Davis, Santee, Ohyler and Leary the sum of one hundred dollars damages and $369 costs, and that the said judgment of the District Court be in all other respects affirmed.

We concur: Ross, J., Sharpstein, J., Myrick, J.

We concur in the judgment: McKee, J., Thornton, J.

DEPARTMENT No. 2.

[Filed May 11, 1883.]

No. 8139.

JENNINGS, APPELLANT, *v.* LE ROY, RESPONDENT.

CONSTITUTION — STREET WORK—ASSESSMENT—BAY—STREET GRADE. The Act of April 1, 1878, to authorize the Board of Supervisors of San Francisco to order Bay street graded, and change its grade (Stats. 1877–8, p. 931), was constitutional when passed.

ID.—ID. The general statutes concerning the improvement of streets in San Francisco, as modified by the Act of April 1, 1878, apply to this case. As the warrant, assessment and diagram are *prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the Superintendent of Streets, and of the regularity of all the acts and proceedings of the Board of Supervisors upon which they are based (Stats. 1871–2, p. 815, Sec 12), and such warrant, etc., had been introduced in evidence, and there was no conflict, the findings of the Court below are not sustained.

ID.—ID. The claim that when the line of grade has once been established the adjacent property-owners have a right of property in the line of grade as established, which cannot be taken from them without compensation, is not tenable. The owner holds his property subject to the right of the legislative authority to establish and change grades.

Appeal from Superior Court, San Francisco.

J. M. Wood for appellant.
B. S. Brooks for respondent.

MYRICK, J., delivered the opinion of the Court:

The Act of April 1, 1878, (Stats. 1877–78, p. 931,) must be construed as having the effect of changing the grade of

Bay street at the points therein designated, and of authorizing that street, between the termini named, to be graded to the line of grade thereby established, without a petition from property-owners. At the time of the passage of that act there was no constitutional objection to its passage. It was competent for the Legislature to pass the act, even though it might, in effect, repeal or modify some provisions of existing laws, and that without reenacting the statutes as modified or changed. The purpose of the act is sufficiently stated in its title. The respondent claims that when the line of grade has once been established, (the street not being in fact graded to the line,) the adjacent property-owners have a right of property in the line of grade, as established, which cannot be taken from them without compensation. We have not been referred to any case or to any text writer which sustains the proposition. The cases are uniform, that the owner holds his property subject to the right of the legislative authority to establish and change grades; some cases, however, have stated that the owner is entitled to damages if his improvements or his right to use them are affected. The case before us is not such an one.

The Court found that the resolution ordering the work to be done, was not, after its introduction, published before final action thereon; that notice of the nature and character of the work to be done, with specifications, was not posted in the office of the Superintendent of Streets; and that no notice of the award was published. The only evidence upon that subject was the assessment, diagram, warrant and affidavit of demand and non-payment, with the endorsements thereon, showing due recording. The statute (Stats. 1871–2, p. 815, sec. 12,)makes the warrant, assessment and diagram *prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the Superintendent, and of the regularity of all the acts and proceedings of the Board of Supervisors, upon which they are based; therefore, there was some evidence of the regularity and correctness of the proceedings, and there being no evidence in conflict, the findings above referred to are not sustained.

We are of opinion that the general statutes concerning the improvement of streets in the city and county of San Francisco, as modified by the Act of April 1, 1878, apply to the case before us.

The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: Sharpstein, J., Thornton, J.

Pacific Coast Law Journal.

Vol. XII. September 29, 1883. No. 6.

Current Topics.

THE COLERIDGE BANQUET AT CHICAGO.

The Chicago Legal News gives a very long account of the banquet given to the Lord Chief-Justice by the Chicago Bench and Bar.

It prints several pages of letters written by invited guests, accepting or regretting. We give two of these. One is a letter of acceptance from Justice Cooley, and is as follows:

"Ann Harbor, Mich., Sept. 21, 1883.

"*Frederick Ullman, Esq.*,

"I accept with thanks for the courtesy.

"T. M. COOLEY."

The other is one of regrets.

"Madison, Wis., Sept. 24, 1883.

"*My Dear Sir*: My grateful acknowledgments of the distinguished honor of your invitation to the dinner to the Lord Chief-Justice of England, must go, mixed with my pain, that duties to others deny me the gratification of the festivities.

"The occasion is one to stir the professional sensibilities of the lawyer. The hereditary Head and Oracle of the Common Law, whose vitalizing streams have quickened the principles and usages of the New World in harmonious accord with the ordinances of freedom, comes to the Lawyers of the West like a Celestial Messenger from the Abode of Justice, awakening love and summoning veneration.

"He is the Ambassador of the Divinity of the Law to the far-away lands which have been willingly subjugated by its benificent power; entitled to the grateful homage of its liegemen in

testimony of their sense of its value to men. They will cordially add their common esteem for the learned and illustrious personage whose judgments have proved him of the blood of them who have occupied his seat in long and glorious succession. And it is especially fitting that the honors of the West should be paid him in the great city of Illinois, where survive latest the forms and practices of ancient use in the conservative fidelity of a bar, whose shining members preserve its ancient spirit with the 'gladsome light of jurisprudence, the loveliness of temperance, the stability of fortitude and the solidity of justice.'

"With cordial thanks for the kind words of your letter, I beg to remain,

"Your obliged friend and servant,

"WM. V. VILAS.

Hon. Frederic Ullman, Chairman," etc.

This is as *Vil—as* it can be—but then, he could not go.

The speeches delivered were many and good. We are sorry that we have not room to give more than a portion of the very sensible talk of the Chief-Justice.

"I learn—and there are many here to correct me if I am wrong—I learn that in this State of Illinois, the common law of England and the common practice of England are maintained with fewer changes and more according to ancient precedent than in almost any other State in the union. You are aware that in the old country we have lately made great changes in our procedure, changes upon the merit of which it does not become me to express an opinion, because upon most of them, either in the House of Commons or in the House of Lords, I have had something to say, but of which I may say this: That I hope that, while cheapening systematizing, simplifying, and expediting justice, they have not drawn away the law of England from those ancient, well-settled principles which have stood the test of ages, and which you, gentlemen, and I hold in common. Whether you will follow, or whether you will not follow, those changes must depend upon whether, in your own good judgments, they seem to suit or not to suit the genius of your people.

Law, after all, is but the orderly and well-regulated expression of that which from time to time the highest and most cultivated intelligence of the community approves of. And I leave, as, indeed, I must leave, the question of whether you adopt or reject these changes of ours absolutely where it is best left—to your own good sense. I believe—at least I have so learned—that we differ at present rather in details of practical administration than in any solid and important principles of justice. You have a pure judiciary, you have an able, an honest, an eloquent, an independent bar; and I learn with comfort that you

have a not unsatisfactory system of bills of cost. Now, in all these things we are alike. We have a pure judiciary, we have a bar which I hope is a credit to the Old Country, we have bills of costs which, considering that we are a little island, seem to me to be framed sometimes rather with a sense of your proportions than of ours. And it is in all these things that, while we are so thoroughly alike, it is in all these things that we can hold out to one another the hand of fellowship, and that we can feel that we are united in obedience to the same principles, in admiration of the same authorities, in submission to the same principles of law.

But, gentlemen, I am reminded by many of those who sit around me, I am reminded by what I saw yesterday and what I have seen to-day, that it is, after all, but a small part which the active practice of the law can occupy in the affairs of a vast community like this, teeming, as it seems to me, with every sort of life, plunging forward into the future with the grandeur and magnificence, not of chartered freedom or unchartered freedom, but of regulated and well-ordered force. God speed you! God be with you! God keep you from ever confounding mere strength with greatness, confounding piles of gold and silver with the true resources of the grandeur and the greatness of the wealth of the Nation, from confounding the smiling self-satisfaction which any coxcomb can feel with the just and noble pride of a great nation to which I say from my heart I believe no nation was ever more righteously entitled than you are. No Englishman can look upon the destinies of the great Republic—no Englishman that is worthy the name of Englishman—without a feeling of admiration and ardent hope. There is no tinge of jealousy, believe me; there is not a shade of grudging, I assure you, in the congratulation of my country to yours. I, at least, who have known Mr. Gladstone since 1847, who never had and never will have any political leader but that great man, who owe him so much, who know him so well, who have supported him with constant agreement and hearty satisfaction in office and out—it is not difficult for me, at least, to say, from the bottom of my heart that I give the heartiest, and sincerest, and most cordial wishes for the present and future welfare of my kin beyond the sea."

A NEW BOOK OF PRACTICE.

We learn that R. Y. Hayne, Esq., late Judge of the Superior Court, has a law book in press. The idea of the book is the mode of attacking a judgment or order of a Court. The investigation of this subject includes the matter of New Trials, Appeals, Writs of Certiorari, Prohibition and Habeas Corpus, and also proceedings in equity, such as injunctions. The nature of the work has compelled him to limit it to the California

codes and decisions, and the decisions of the U. S. Supreme Court. In his investigations he has personally examined every decision in the sixty volumes of California Reports. The ability, industry and accurate habits of Judge Hayne justify us in anticipating a very valuable treatise on this important subject. We say "important" advisedly, because the multiplicity of Courts, the short terms and poor pay of the Judges, the enormous mass of cases on the Court calendars, are creating a need, more pressing than ever, for aids to the lawyer to follow the principles of law more than the reported adjudications thereof.

Supreme Court of California.

IN BANK.

[Filed May 19, 1883.]

No. 8626.

ESTATE OF SUEZ MAGEE.

SUCCESSION—BASTARD—HEIR. **Albert, legitimate son of Elizabeth, deceased, is held entitled to succeed to the estate of Suez, as heir to the mother of Elizabeth and Suez, both the latter having been illegitimates.**

Appeal from Superior Court, Santa Barbara County.

P. R. Wright and *A. A. Oglesby* for appellant.
W. C. Stratton and *C. Storck* for respondent.

MYRICK, J., delivered the opinion of the Court:

The question involved in this appeal concerns the right of succession under the statute of this State as affected by illegitimacy. Sabra Magee was the common ancestor. She had two legitimate daughters—Eliza and Susan. The descendants of Eliza (all legitimate) are the claimants on one side; they are named Cunningham. Albert E. Remond, claims that he, as descendant of Susan, is entitled, on the other side, to the property. His claim is based on the following facts: Susan had two illegitimate daughters—Elizaboth and Suez. Albert E. is the legitimate son of Elizabeth. Susan and Elizabeth died before January 1, 1880. Suez Magee (the intestate, whose property is the subject of consideration) died March 24, 1880; and the question is, Will the property left by Suez Magee go to the Cunninghams, as heirs of the intestate, or will it go to the claimant, Albert E. Remond?

According to Section 1,388, Civil Code, if any illegitimate child (not acknowledged or adopted by his father) dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs-at-law. Suez Magee was illegitimate; she died intestate; Susan, her mother, had died before her; therefore, upon the death of Suez, the property of the latter was to go to the heirs of the mother, Susan. The next question, then, is who are the heirs of Susan? Section 1,387, Civil Code, we think, answers the inquiry: Every illegitimate child *is in all cases* an heir of his mother, and inherits *in the same manner as if born in lawful wedlock*. There is no question as to the heirship of Albert E.; he is the legitimate son of his mother, Elizabeth. She (Elizabeth) was the illegitimate daughter of Susan. By Section 1,387, just referred to, Elizabeth was the heir of her mother, in the same manner as if born in lawful wedlock. If, then, Elizabeth had been born in lawful wedlock, she would unquestionably have been heir of her mother; being born out of wedlock, she is by the statute made heir of her mother in the same manner as if born in wedlock. Being, then, the heir of her mother, and dying leaving issue, the property of Suez goes to such issue; not because the issue is heir of Suez, but is heir of Susan. In this same section there is a proviso regarding the inheritable blood of an illegitimate child, expressed in the following words: "But he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried," etc. This proviso does not apply to the case before us. If Eliza, the other daughter of Sabra, the common ancestor, had died leaving estate, the illegitimate children of Susan (Elizabeth or Suez) or their descendants, could not have represented Susan for the purpose of inheriting from Eliza; Eliza's estate would, rather, have escheated. We think the word "kindred" used in the above-quoted clause, relates to the kindred referred to in Section 1,386, meaning lawful kindred, and is for the purpose of qualifying the general words used in Section 1,387, and excluding the illegitimate from inheriting, through the mother, the estate of other relatives.

"By the rules of the common law, terms of kindred when used in a statute, include only those who are legitimate, unless a different intention is clearly manifest." (*McCool* v. *Smith*, 1 Black, U. S. 459; *Hughes* v. *Decker*, 38 Me. 153; *Cooley* v. *Dewey*, 4 Pick. 93.) In using the word "kindred," in Section 1,387, the Legislature intended to preclude from

the general words preceding it the construction that an illegitimate might by representation inherit from those whom the common law or Section 1,386 acknowledges as kindred; but did not intend to prevent a legitimate son (Albert E.)from inheriting, through his mother (an illegitimate daughter) from her mother Susan, nor from being her heir. Otherwise, we would have the construction that an illegitimate daughter is an heir of her mother, and as such may take the estate of another illegitimate daughter of the same mother, but that the legitimate child of such illegitimate daughter cannot take.

If Elizabeth had died intestate and without issue, doubtless the estate of Suez would have gone to the Cunninghams, as the heirs of Susan, the mother of Elizabeth and Suez; but, as Albert E. is, through his mother Elizabeth, the heir of Susan, he is entitled to the estate of Suez—not, perhaps, because he is heir of Suez, but because he is the heir of the mother of Suez, and as such is, under the statute, entitled to take.

We do not think the provisions of Section 1,386 have application to illegitimates; but that the rights of such persons are derived from Section 1,387 and 1,388. Section 1,386 provides for the course of succession among legitimates; Sections 1,387 and 1,388 refer to illegitimates, and provide for the course of succession as to them; and each provision is complete, so far as the Legislature has seen fit to declare. One system is provided for in the one section; another system is provided for in the others.

The decree is reversed and the cause is remanded with instructions to reeder a decree in accordance with this opinion.

We concur: McKee J., Thornton, J., Sharpstein, J., Ross, J.

IN BANK.

[Filed September 28, 1883.]

No. 10,743.

PEOPLE, RESPONDENT, *v.* WOOD, APPELLANT.

LARCENY—EVIDENCE OF COLLATERAL FACTS INADMISSIBLE. The defendant was charged with larceny. The prosecution was permitted by the Court to introduce, against the objections of the defendant, evidence of other independent transactions between the defendant and persons other than the prosecuting witness, similar in character to the one constituting the offense for which the defendant was being tried. *Held*, error.

ID. The Court charged the jury: "*The whole case*, gentlemen of the jury, *turns* upon the intent to steal at the time the money was paid. * * * If A parts with his money to B under *false representations* made by B for the express purpose of defrauding A, and B make at such time his promissory note payable to A sometime after date, B is criminally liable immediately upon the consummation of the agreement, and it is no defense that the time has not arrived *at which the note was to be paid*." *Held*, misleading.

Appeal from Superior Court, San Francisco.

Attorney-General for respondent.
Leander Quint for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

The exception to the rulings of the Court, on the defendants objections to the introduction of evidence of other independant transactions, between him and persons other than the prosecuting witness, similar in character to the one which constitutes the basis of the charge on which the defendant was tried and convicted, merit careful consideration.

The defendant was charged with larceny. Whether he was guilty depended on the the character of a transaction between him and the prosecuting witness, by which the latter transferred the possession of a certain sum of money to the former. If it was the understanding of the parties that the *property* in the money, as well as the *possession* in of it, should pass, the fraudulent acquisition and subsequent use of it would not constitute larceny. Proof that the defendant had obtained money from other persons by means similar to those which he employed to obtain it from the prosecuting witness, might tend to show that the defendant was a great knave, but would not tend to show that he did not obtain the property in the money, as well as the possession of it by fraudulent means. The question is, Was it the understanding that the title to the money should pass? Was it borrowed, or received on deposit for a special purpose? This depends on the understanding of the parties at the time of the actual transfer. Could the defendant be permitted to prove similar transactions between him and other persons, in which it was understood that the title as well as the possession of the money passed? The Court below very properly held that he could not. The understanding between him and persons other than the prosecuting witness, from whom he obtained money by means exactly similar to those resorted to for obtaining it from the prosecuting witness, would not in the least degree tend to prove what was the understanding between the defendant

and the prosecuting witness. If the understanding was the same in each case, and was such as to make the obtaining and use of the money in each case larceny, it would simply result that a defendant might be proved to have committed a series of larcenies, although charged with the commission of only one. For obvious reasons the law will not permit that to be done. "To admit evidence of such collateral acts would be to oppress the party implicated by trying him on a case as to which he has no notice to prepare, and sometimes by prejudicing the jury against him by publishing offenses, of which, even if guilty, he may have long since repented, or may have long since been condoned. Trials would, by this process, be injuriously prolonged, the real issue obscured, and the verdicts taken on side issues." (1 Wharton Ev. 29.)

The issue in this case is whether the defendant obtained money from the prosecuting witness under such circumstances as would constitute the subsequent use of it by defendant, larceny. And it was inadmissible to put in evidence the fact that he obtained money from others under similar circumstances which he used as he did that obtained from the prosecuting witness. The rule which makes the introduction of such evidence inadmissible has been recognized and applied in numerous cases. In *Commonwealth* v. *Jackson* (132 Mass., 116), the defendant was tried and convicted on a charge of obtaining money and property by false pretenses; that is, by "falsely pretending and asserting to one John Parker that a certain horse was sound and kind, with the knowledge that such assertion was false and with intent to defraud the said Parker by inducing him to part with his money and other valuable property; and for actually defrauding him." At the trial the Government was permitted to introduce evidence of similar transactions between the defendant and other persons, "solely for the purpose of showing the intent with which the defendant made the sale of the horse to Parker as charged in the indictment." This was held to be error. The Court says: "The other statements made by defendant at other times as to other animals might have been false, while these were not. The transaction formed no part of a single scheme or plan any more than the various robberies of a thief. They were entered upon as from time to time he might succeed in entrapping credulous or unwary persons." In *Regina* v. *Holt* (8 Cox, C. C., 411), the prisoner was charged with obtaining a specific sum of money from one Hirst by false pretenses, *i. e.*, by falsely representing that he was authorized by his

master to receive it. Evidence was admitted of his having obtained another sum of money from another person by a similar false pretense. On appeal it was held that such evidence was not admissible for the purpose of proving the intent of the prisoner when he committed the act charged in the indictment, and the conviction was quashed.

In *Cole* v. *The Commonwealth* (5 Grattan, 969), the prisoner was tried on a charge of advising the slaves of E. L. to escape. Evidence of his having also advised the slave of S. A. to escape was admitted. For this error alone the judgment was reversed.

Commonwealth v. *Tuckerman* (10 Gray, 173), is not a parallel case. The defendant was indicted for embezzling the money of a corporation while acting as its Treasurer. He made a statement in writing by which it appeared that while acting in the same capacity he had from time to time converted to his own use other moneys than those specified in the indictment, but belonging to the same corporation. The entire statement was admitted in evidence. No attempt was made to introduce evidence of the embezzlement by him of money belonging to any other person or corporation than the one named in the indictment. On the other hand, "all the proof which was offered in relation to transactions not intimately and directly connected with the particular accusation against the defendant, or with the evidence or in necessary explanation of the evidence, adduced to establish it, was carefully rejected."

In *Commonwealth* v. *Merriam* (14 Pick., 519), where a party was tried upon an indictment for the crime of adultery, evidence of three instances of improper familiarity between the prisoner and the female named in the indictment was admitted. But no attempt was made to prove any such familiarity between him and females other than the one so named.

In cases where it is necessary to prove *scienter* or intent, or of negativing accident, evidence of overt acts of the same class as that under investigation is admissible within certain well defined limits. On the trial of a charge of holding or circulating forged paper or of receiving stolen goods, it being incumbent on the prosecution to prove that the holder or utterer of the forged paper knew it to be such, or that the party charged with receiving stolen goods knew that they had been stolen, evidence of the possession or utterence of other forged paper, or of receiving other stolen goods is admissible. "This is an exception to the general rule of evidence." (Per Shaw, J., in *Commonwealth* v. *Stone*, 4 Met. 42).

"It may well be doubted whether the exception to the general rule of law ought to be further extended." (Per Devens, J., in *Commonwealth* v. *Jackson*, *supra*).

In *Regina* v. *Oddy*, 15 Cox C. C., 210), Lord Campbell remarks as to the reception of evidence of other occasions where base coin or counterfeit bills are charged to have been knowingly uttered: "I have always thought that those decisions go a great way, and I am by no means inclined to apply them to the criminal law generally."

Where the proof of a single overt act might leave reasonable doubt whether it was intentional or accidental, evidence of other acts of a similar character has sometimes been admitted. But in the case at bar no such question could arise. Neither is there any question as to the knowledge or intention of the defendant. The only questions which the jury had to determine were, 1. Did the defendant fraudulently obtain money from the prosecution witness? 2. If he did, was it received on deposit for a special purpose, and unlawfully converted to his own use?

These questions being answered in the affirmative, the law would supply everything else necessary for the conviction of the defendant. And if not answered in the affirmative, proof of a thousand similar transaction with other persons, would not justify his conviction. There was therefore no necessity nor occasion for the introduction of evidence which is admissible only in cases where the commission of the act charged does not necessarily imply a criminal intent. Nothing short of necessity will justify a resort to such evidence.

"It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but, also, it leads the jury to violate the great principle, that a party is not to be convicted of one crime by proof that he has been guilty of another." (*Commonwealth* v. *Shepard*, 1 Allen, 575).

Another exception to which our attention has been directed is to that portion of the charge in which the Court said: "*This whole case*, gentlemen of the jury, *turns* upon the intent to steal at the time the money was paid. * * * If 'A' parts with his money to 'B' under *false representations* made by 'B' for the express purpose of defrauding 'A,' and 'B' make at such time his promissory note payable to 'A' sometime after date, 'B' is criminally liable immediately upon the consummation of the agreement, and it is no defense that the time has not arrived *at which the note was to be paid.*"

It is true that, in other portions of the charge, the Court referred to the distinction between larceny and obtaining property or money under false representations, based upon the intent of the party injured to part with the *possession* only in the one case, and to transfer his *property* in the money or goods, in the other. But the particular instruction is based upon a hypothesis which assumes facts, so far as they go, like those proved at the trial. It, in effect, informs the jury that if the prosecuting witness "parted with his money," taking a promissory note therefor, by the terms whereof the money was to be repaid with interest—the prosecuting witness having been induced to enter into such an arrangement by "false representations" of defendant—the defendant was guilty of larceny at the moment he received the money. And this was preceded by an instruction that the "whole case" turned upon the intent of the defendant to steal (or not to steal) at the time the money was paid. Under the circumstances we cannot say the charge did not mislead the jury. Its natural meaning is, if "A" is induced to part with his money to "B" upon "B's" promise to repay it at a future day, "A" being induced to lend the money by false representations, "B" is guilty of larceny, although the time has not arrived at which the money was to be repaid. A promissory note is a promise in writing to pay. The jury may have understood the instruction to be what its language imports: If "A" is induced by the fraudulent representations of "B" to lend, or "part with" his money, and to take for it "B's" promise to repay it, "B" is guilty of larceny. And further, that the whole case turned on "B's" intent never to pay the note which, by fraudulent representations, he had induced "A" to receive.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J., Ross, J.

I concur in the judgment: McKee, J.

IN BANK.

[Filed September 17, 1883.]

No. 10,854.

PEOPLE, APPELLANT, *v.* BOYLE, RESPONDENT.

CRIMINAL LAW—INFORMATION—PREVIOUS CONVICTION—TWO OFFENSES. An information which, in addition to charging the offense committed, alleges also the fact of a previous conviction of another crime, does not charge two offenses.

Appeal from Superior Court, Yolo County.

The defendant was examined before a committing magistrate upon a charge of assault to rob, and it was also proven that he had been previously convicted of petit larcency. He was held to answer, and the Justice stated the fact of his previous conviction in the commitment. Afterwards, the the District-Attorney filed an information charging the defendant with an assault to rob, and also stated in the information the fact of his previous conviction of petit larceny.

J. Craig, District Attorney, and *J. C. Ball*, of counsel for The People, said: "It (the information) does not charge two offenses, but simply an aggravated offense. There is no such offense known as a previous conviction. It is a fact to be alleged and proven in order to fix the punishment, and could not be proven without alleging it in the information." (Citing *People* v. *Stanley*, 47 Cal. 115; *Boyle* v. *Carlton*, 7 Pac. C. L. J. 108.)

F. S. Sprague and *Byron Ball* attorneys for defendant.

MCKINSTRY, J., delivered the opinion of the Court:

Defendant moved to set aside the information on the ground that he had not been legally held to answer, in that, the *commitment* showed upon its face that defendant had previously been convicted of the offense for which he was held to answer. As the commitment is not in the transcript, we cannot say what is shown upon its face.

Defendants demurred to the information—that it does not substantially conform to the requirements of Sections 950, 951 and 952 of the Penal Code, and that more than one offense is charged therein.

The information contains all the averments required by the sections of the Penal Code. It also contains an averment that, before the commission of the offense therein charged, defendant was convicted of petit larceny in a Justice's Court.

If, by reason or the repeal of Section 969 of the Penal Code, which took effect April 9, 1880, it is no longer proper to allege a former conviction in an information or indictment the averment with respect to the previous conviction is surplusage, which should be stricken out or disregarded. The statement that defendant had previously been convicted of a larceny, is not a distinct charge of larceny to be tried under the information. Two offenses are not therefore charged in the information. If, by reason of the language employed in Section 1158 of the Penal Code, an averment

of a former conviction is proper, the information is unobjectionable. The demurrer, should, therefore, have been overruled.

Judgment and order reversed, and cause remanded with direction to the Court below to overrule and disallow defendant's demurrer to the information.

We concur: Thornton, J., Ross, J., Myrick, J., McKee, J.

IN BANK.

[Filed September 28, 1883.]

No. 8896.

MEYER, PETITIONER, *v.* BROWN, RESPONDENT.

CONTRACT—BONDS—MUNICIPALITY SACRAMENTO. The Act consolidating the city and county of Sacramento made provision for the payment of all claims against the old city governments and offered in lieu thereof bonds of the city of Sacramento with the seal of the consolidated government, which carried with them the pledge of an annual tax, for municipal purposes, on all real and personal property within the city limits, except such as are exempt by law, of one hundred cents on the one hundred dollars, fifty-five per cent. of which to be set apart and appropriated to an interest and sinking fund to be applied to the payment of the annual interest upon the bonds and to their final redemption. Subsequently the Consolidation Act was repealed. *Held*, that a writ of mandate will lie to compel the present city authorities to levy the tax provided by the Consolidation Act.

Appeal from Superior Court, Sacramento County.

Rosenbaum & Scheeline and *S. C. Denson* for petitioner.
W. A. Anderson and *McKune & George* for respondent.

Ross, J., delivered the opinion of the Court:

On the 27th day of February, 1850, the Legislature of the State passed an Act by which it was declared that all that tract of land lying within certain designated limits should thereafter be known by the name of Sacramento City, for the government of which there should be a Mayor, Recorder, and Council to consist of nine members, one of whom should be elected President; that the Mayor, Recorder and Councilmen should be a body politic and corporate by the name and style of "The Mayor. Recorder and Common Council of Sacramento City," and by that name they and their successors should be known in law, have perpetual succession, sue, and be sued, in all Courts, and in all actions whatsoever, etc., etc. (Statutes 1850, pp. 70 *et seq.*) By an Act passed March 26, 1851, the Legislature declared that the same ter-

ritory should thereafter be known by the name of the "City of Sacramento," for the government of which there should be a Mayor, Recorder, and Council to consist of nine members; that the Mayor, Recorder and Councilmen should be a body politic and corporate by the name and style of the "Mayor and Common Council of the City of Sacramento," and by that name they and their successors should be known in law, have perpetual succession, sue and be sued in all Courts and actions whatsoever, etc., etc. By the seventh section of the Act last mentioned the Council was, among other things, given power to cause the streets to be cleaned and repaired; to provide for the making and improving of sidewalks; to lay out, extend, alter or widen streets and alleys; to alter, improve, keep and repair and have full control of the levee; to establish and regulate a police to be subject to the supervision of the Mayor; to make appropriations for any object of city expenditure; to erect and maintain poor-houses and hospitals for the support of the indigent, sick and insane; to prevent the introduction and spreading of diseases; to erect, repair and regulate wharves; to provide for the prevention and extinguishment of fires, etc., etc.

On the 24th of April, 1858, the Legislature passed an Act consolidating the city and county governments, the first and second sections of which are as follows:

"Section 1. For the government of that territory now known as the city and county of Sacramento, there shall be a Board of Supervisors; and the said Board of Supervisors and their successors in office shall be a body politic and corporate under the name and style of "The City and County of Sacramento,' and by that name they shall be known in law; may make, have, keep, alter and renew a common seal, different and distinct from the seal of the County Clerk; have perpetual possession; may sue in all Courts, and in all actions whatsoever; may, under the limitations hereinafter provided, purchase and hold real estate or personal property, and receive and hold the same by legacy or donation for the city and county, or in trust for the use of public schools, or the fire department, or for a poor-house and indigent sick; and they may do all such other things and exercise all such other powers as by this Act or by any other law are or may be granted or allowed to them to do; but the city and county shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in actions, and effects, be subject to any attachment, levy or sale, or any process whatever, either mesne or final.

"Section 2. The City and County of Sacramento is hereby made and constituted the successor of the corporation by this Act dissolved, and heretofore known as 'The Mayor and Common Council of the City of Sacramento.' The lands, public and private buildings, property, rights of property, actions, rights of actions, moneys, revenues, income and trust, now vested in, or belonging, or in anywise appertaining to the corporation known as 'The Mayor and Common Council of the City of Sacramento,' are hereby transferred to and vested in, and are declared to appertain and belong to the City and County of Sacramento, as hereinafter provided."

Sections 37, 38, 34 and 35 of the Consolidation Act are as follows:

"Section 37. For the purpose of liquidating, funding and paying the claims against the City and County of Sacramento, hereinafter specified, the Treasurer shall cause to be prepared suitable bonds of the County of Sacramento, not exceeding the sum of six hundred thousand dollars, and for the City of Sacramento, not exceeding the sum of one million six hundred thousand dollars, bearing interest at the rate of six per cent. per annum, from the first day of January, one thousand eight hundred and fifty-nine, and payable at the office of the Treasurer. Said claims shall be funded in the order of their reception; shall, in their order of reception, be entitled to the shortest time; and one-fourth of the whole amount made payable on the first day of February, one thousand eight hundred and eighty-eight; one-fourth on the first day of February, one thousand eight hundred and ninety-three; one-fourth on the first of February, one thousand eight hundred and ninety-eight; and the balance on the first of February, one thousand nine hundred and three. The interest on said bonds shall be made payable at the office of the Treasurer, on the first day of January of each year. Said bonds shall be signed by the President of the Board of Supervisors, countersigned by the Clerk of the Board of Supervisors, and indorsed by the Treasurer, and shall have the seal of the city and county affixed thereto. Coupons for the interest shall be attached to each bond, so that they may be removed without injury to the bond: said coupons, consecutively numbered, shall be signed by the Treasurer. It shall be the duty of the book-keeper of the city and county, and the Treasurer, each, to keep a separate record of all bonds issued, showing the number, date and amount of each bond, to whom issued, upon what claim, and its amount; and none of the claims herein specified

shall be liquidated or paid except in the manner herein provided.

"Section 38. The following claims shall be received and funded under the provisions of this Act: *First*, All legal debts or liabilities against the County of Sacramento, which may be unpaid and unprovided for by this Act on the first day of January, one thousand eight hundred and fifty-nine. The annual interest and principal of all bonds issued for claims mentioned in this section, shall be paid from the interest and sinking fund, as provided in Section thirty-six, and in the manner otherwise provided in this act. *Second*, All legal debts or liabilities against the City of Sacramento, which may be unpaid and unprovided for by this Act, on the first day of January, one thousand eight hundred and fifty-nine. The annual interest and principal of all bonds issued for claims against said city, shall be paid from the interest and sinking fund, provided in Section thirty-five, and in the manner otherwise provided in this Act.

"Section 34. The Board of Supervisors shall not have power to levy any greater taxes than as follows, viz: On the real and personal estate, except such as is exempt by law, throughout the city and county, a tax of one hundred cents on the one hundred dollars; such State taxes as the laws may require, and in addition thereto, they shall levy, for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, a tax of one hundred cents on the one hundred dollars; also, a tax for road purposes of five cents on the one hundred dollars, on the property outside the city limits. All of which taxes shall be levied and collected strictly in accordance with the revenue laws of the State, except as may be otherwise provided in this Act; *provided*, that nothing contained in this section shall prevent the Board of Supervisors from levying in addition, a tax in accordance with an Act passed February (March), one thousand eight hundred and fifty-eight, entitled an Act to amend an Act passed April twenty-seventh, one thousand eight hundred and fifty seven, entitled an Act to submit to the people of the counties of Sacramento and El Dorado, a proposition for the construction of a wagon-road.

"Section 35. The revenue derived from and within the city limits, for municipal purposes, viz: taxes, licenses, harbor dues, water rents and fines collected in the Mayor's Court, or otherwise when paid into the treasury, shall be set apart and appropriated as follows: Fifty-five per cent. to an interest and sinking fund, which shall be applied to

the payment of the annual interest and the final redemption of bonds issued for city indebtedness in accordance with the provisions of this Act; fifteen per cent. to a salary fund, which shall be applied to the payment of the salaries of municipal officers as provided in this Act; eight per cent. to a school fund, which shall be applied to the support of schools within the city limits; and the balance, twenty-two per cent. to a fund to be used for all such necessary municipal expenses as are not otherwise provided for in this section, and shall be called the contingent fund."

By the second section of the Act of Consolidation, all of the property and rights theretofore belonging or pertaining to the corporation known as "The Mayor and Common Council of the City of Sacramento," were vested in, and declared to appertain and belong to the consolidated government. But, in dissolving the old city government and transferring all of its property and rights to a new corporation, the Legislature did not forget that there were outstanding claims against the old one. Recognizing that fact, it made provision in and by the Act of Consolidation for "liquidating, funding and paying" those claims. Suitable bonds were directed to be prepared for the City of Sacramento, not exceeding one million six hundred thousand dollars, with interest coupons at the rate of six per cent. per annum, payable on the first day of January of each year, with which the legal claims against the old city government were to be paid and discharged. To pay the interest as it should accrue, and to redeem the bonds, it was provided by the Act of Consolidation that fifty-five per cent. of the revenue derived from and within the city limits for municipal purposes, that is to say, taxes, licenses, harbor dues, water rents and fines collected, should be set apart and appropriated to an interest and sinking fund, which should be applied to the payment of the annual interest and the final redemption of the bonds; and the governing body of the consolidated government, viz: the Board of Supervisors, was required to levy for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, a tax of one hundred cents on the one hundred dollars.

Having thus made provision for the payment annually of the interest on the bonds, and ultimately for their redemption, the Legislature offered them in payment of the legal claims against the old city government. The offer was accepted, and the holders of the latter surrendered their claims, in consideration of which the consolidated government issued to them its bonds, pursuant to the provisions of

the Act. The bonds carried with them the pledge of an annual tax, for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, of one hundred cents on the one hundred dollars, fifty-five per cent. of which to be set apart and appropriated to an interest and sinking fund to be applied to the payment of the annual interest upon the bonds and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims. When the bonds, for whose payment, with interest, provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made as solemn and binding and as much beyond subsequent legislation as it would have been if made between private persons. These views will be found sustained and amplified in an able opinion recently rendered by the Supreme Court of the United States in a case entitled *Louisiana* v. *Pillsbury*, reported in 105 U. S., p. 278. It is well occasionally to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value, than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other.

Some minor objections are made to the petition, which is for a writ of mandate, compelling the city authorities to levy the tax referred to, none of which, in our opinion, are well taken.

Demurrer overruled, and defendants allowed ten days within which to answer.

We concur: McKinstry, J., Myrick, J., Sharpstein, J., Thornton, J., McKee, J.

IN BANK.

[Filed September 27, 1883.]

No. 8895.

ANAHEIM WATER COMPANY, RESPONDENT,

v.

SEMI-TROPIC WATER COMPANY, APPELLANT.

WATER RIGHTS—RIPARIAN OWNERS—PRIOR APPROPRIATION—PRESCRIPTION—GRANT—ESTOPPEL. The plaintiff, an owner of lands having a frontage on the Santa Ana river, claimed the right, as against the defendant who also owned lands fronting on said river, to keep their irrigating ditch flowing full at all times without regard to the wants and necessities of the defendant. Plaintiff contended that his right was founded; (1) in grant; (2) upon prescription; (3) upon prior appropriation; and (4) upon an estoppel *in pais*.

Held: (1) that the deed by which the plaintiff holds conveyed no right to divert the water of the river belonging to the defendant.
(2). To establish a right by prescription, the act by which it is sought to establish it must operate an invasion of the rights of the other party; so, whilst there was sufficient water flowing in the river for the needs of all parties, its use by one could not be an invasion of any right of the other.
(3). The appropriation by the plaintiff was not prior to that of the defendant.
(4). There must be some degree of turpitude in the conduct of a party before a Court will estop him from asserting his title: so, while there was sufficient water flowing in the river for the needs of *all* parties the defendant was not called upon to object to the appropriation by the plaintiff and is not estopped from asserting his title.

Appeal from Superior Court, Los Angeles County.

Howard, Brousseau & Howard, R. G. Scott and *T. H. Smith* for respondent.
Bicknell & White and *Glassell, Smith & Smith* for appellant.

Ross, J., delivered the opinion of the Court:

In its course through Los Angeles County the Santa Ana river forms the dividing line between the ranches Canyon de Santa Ana, San Juan y Cajon de Santa Ana and Las Bolsas on the one side, and the ranchos Santiago de Santa Ana and Lomas de Santiago on the other. Between the ranchos Canyon de Santa Ana and the San Juan y Cajon de Santa Ana, and also fronting on the river, is a small piece of land belonging to the Government. From a map furnished us by the respective parties, it appears that the rancho Santiago de Santa Ana has a frontage on the river almost equal to the combined frontage of the ranchos Canyon de Santa Ana, San Juan y Cajon de Santa Ana, Las Bolsas and the Government land, and reaches from the sea to a point on the river but a little distant from where the river enters the boundary of the county.

The plaintiffs assert a right to divert from the river sufficient water to keep their ditch, which is alleged and found by the Court below to be six feet wide at the bottom, eight feet wide at the top, and two feet deep (grade not given), flowing full at all times and seasons of the year; and in this asserted right the decree of the Court below secures them, without regard to the quantity of water that may be left in the river when such a quantity is so diverted and irrespective of the wants and the necessities of the owners of the Santiago de Santa Ana rancho, under and for whom the defendant asserts the right to divert a portion of the water of the said river. Counsel for the plaintiffs contend that the right thus asserted and adjudged them is founded, 1, in grant; 2, upon

prescription; 3, upon prior appropriation, and, 4, upon an estoppel *in pais*.

It will be convenient to consider these grounds in their order.

Omitting details, the plaintiffs' title by grant, rests first upon a deed executed September 1, 1857, by Bernardo Yorba, the then owner of the rancho Canyon de Santa Ana, to Juan Pacificus Ontiveras, the then owner of the lower rancho, San Juan y Cajon de Santa Ana; and, secondly, on two deeds executed September 12, 1857, by Ontiveras and wife to George Hansen and John Fronling—the two last-named persons being the predecessors in interest of the plaintiffs.

By the deed of September 1, 1857, Bernardo Yorba conveyed to Ontiveras, for the expressed consideration of two hundred dollars, a right of way in and over a certain strip of the rancho Canyon de Santa Ana commencing at a point 100 veras below a dam in the river on his said rancho "which leads a portion of the water of said river into a ditch running through a portion of said lands and into and through a portion of the aforesaid lands of the said Juan Pacificus Ontiveras (to wit, the rancho San Juan y Cajon de Santa Ana), and which is now used by him for irrigating a portion of said lands and running from said point in a westerly direction to the boundary line of the rancho Cajon de Santa Ana," said strip of land to be sufficiently wide for the construction of a water ditch of capacity to hold and convey water sufficient to irrigate 1200 acres of land and for the passage of a man on horseback on either side of the ditch for the purpose of inspecting and keeping it in order * * * " and also the right to construct a sufficient dam at the before-mentioned point in the said river in order to supply the said ditch with water for the uses and purposes above mentioned."

By one of the aforesaid deeds of September 12, 1857, Ontiveras conveyed to Hansen and Frohling the same rights and interests conveyed to him by the aforesaid deed from Yorba, and by the other deed of September 12, 1857, Ontiveras conveyed to Hansen and Frohling 1165 acaes of the Rancho San Juan y Cajon de Santa Ana, afterwards and now known as the Santa Ana tract, " and also the right of way in and over a strip of land twelve varas wide running through the said rancho San Juan y Cajon de Santa Ana, for the purpose of making a ditch of capacity to carry water sufficient to irrigate the said piece of land; said ditch to be commenced at a point on the eastern boundary line of the aforesaid rancho (San Juan y Cajon de Santa Ana), which may be most convenient

for the purpose, and to run as directly as the nature of the soil and the conformation of the ground will permit, to the said tract of 1165 acres; and also the privilege of using so much of the water from the Santa Ana River as appertains to the said rancho (San Juan y Cajon de Santa Ana) for the purpose of irrigating the same, by virtue of the grant of said rancho by the former Mexican Government and by the laws and customs of the country at the time of such grant, and by virtue of the existing laws and customs as may be sufficient for the purpose of irrigating the aforesaid tract of 1165 acres of land, together with the privilege of making such other ditches through the said rancho (San Juan y Cajon de Santa Ana) as may be necessary for irrigating and cultivating said tract of land."

There can be no doubt that by the deed last mentioned, Ontiveras conveyed to Hansen and Frohling the privilege of using so much of the water of the Santa Ana river *as appertained to the Rancho San Juan y Cajon de Santa Ana* as should be necessary for the irrigation of the Anaheim tract of 1165 acres, provided the quantity of water appertaining to that rancho and previously unconveyed by Ontiveras, was sufficient for that purpose. But of course this grant by Ontiveras could not affect any right of the owners of the Rancho Santiago de Santa Ana to the use of the water of the river.

It is said, however, that at the time of the execution of the deed from Yorba to Ontiveras of date September 1, 1857, Yorba was the owner of an undivided interest in the rancho Santiago de Santa Ana, and that by his deed to Ontiveras he conveyed to him the right (subsequently vested in the predecessors of the plaintiffs) to divert sufficient of the water of the river for the irrigation of 1200 acres of land upon the rancho San Juan y Cajon de Santa Ana. It is not necessary to decide whether the deed of September 1, 1857, from Yorba to Ontiveras conveyed to the latter the right to divert any of the water of the river that pertained to the rancho *Canyon* de Santa Ana; for while those who have succeeded to the rights of Yorba in that rancho were originally made defendants to this suit, the action was subsequently dismissed as to them, and the contest continued only as to those holding under the Santiago grant.

Whatever else might be held with respect to the deed from Yorba to Ontiveras, we think it perfectly clear that no right to divert any of the water of the river that appertained to the rancho *Santiago* was conveyed by it. The deed starts with the recital that "whereas the parties of the first part (Yorba and wife) are seized in fee of a certain rancho or tract

of land called Canyon de Santa Ana * * * lying on and near to the river, said river being one of its boundaries, and the said party of the second part (Ontiveras) being seized in fee of a certain tract of land called San Juan y Cajon de Santa Ana * * * bounding also on said river Santa Ana and lying near to and below the lands of said Bernardo and Andrea Yorba. Now, therefore," etc., in consideration of two hundred dollars, the grantors convey to Ontiveras the right of way over a strip of the rancho Canyon de Santa Ana, commencing and running as already described, sufficiently wide for the construction of a water ditch of capacity to hold and convey water sufficient for the irrigation of 1,200 acres of land, and also the right to construct a sufficient dam in the river at the point of commencement of the strip over which the right of way is conveyed in order to supply the said ditch with water for the irrigation of the 1,200 acres. There is no express grant in this deed by Yorba—and we speak of him as the grantor because the Court below found that, though his wife joined him in the deed, she had no interest in the property—of any right on the part of Ontiveras to divert any of the water of the river, and certainly no express grant of the privilege of diverting any of the water of the river that pertained to the grantor, as owner of an undivided interest in the rancho Santiago de Santa Ana. Impliedly it undoubtedly recognized the right in Ontiveras to divert a part of the water, but it must be remembered that by reason of his proprietorship of the rancho San Juan y Cajon de Santa Ana Ontiveras then possessed the right to divert such portion of the water of the river, for the purposes of irrigation, as appertained to his rancho. And the fact that he was then diverting a portion of the said water for that purpose is expressly recited in the deed; for by its terms the stip of the Canyon rancho over which Yorba conveys to him the right of way for a ditch, is made to commence at a point 100 varas below a dam in the river, on the Canyon rancho, "which leads a portion of the water of said river into a ditch running through a portion of said lands and into and through a portion of the aforesaid lands of the said Juan Pacificus Ontiveras and which is now used by the said Juan Pacificus Ontiveras for irrigating a portion of his said lands." But no reference whatever is made in the deed to the rancho Santiago. Irrigation upon that rancho as well as upon the ranchos Canyon and Cajon with the water of the river was then carried on, and had been carried on for many years. There was then, according to the findings of the Court below, and continued to be until within a year or two prior

to the commencement of this action in 1877, sufficient water flowing in the river to supply the wants of all the parties bordering on the stream. *Under these circumstances* certainly, the owners of each of these ranchos were entitled to divert, for the purposes of irrigation upon their respective tracts, such portion of the water of the river as appertained to their respective ranchos, due regard being had to the rights of each and all the others. Ontiveras, as owner of the San Juan y Cajon de Santa Ana, was entitled to divert, for the purposes of irrigation upon his rancho, such portion of the water as rightly appertained thereto; and in the deed by which he conveyed to Hansen and Frohling the Anaheim tract of 1,165 acres, he expressly granted to them the privilege of using so much of the water of the river, appertaining to his rancho, as should be sufficient for the irrigation of that tract. But in the deed from Yorba to Ontiveras, executed but a few days before, there is no such language. Yorba thereby conveyed to Ontiveras a right of way over his rancho Cañon for the construction of a ditch of capacity to hold and convey water sufficient for the irrigation of 1,200 acres of the rancho San Juan y Cajon de Santa Ana, and also the right to construct a sufficient dam in the river at a designated point upon the Canon rancho in order to supply the ditch with water for the 1,200 acres. Whether the water thus to be diverted was the water that appertained to Ontiveras, as the owner of the rancho San Juan y Cajon de Santa Ana or water that appertained to Yorba as the owner of the rancho Canyon de Santa Ana, need not be determined for the reason already assigned, but by no construction of the deed consistent with reason or authority, can it be held to be any part of the water appertaining to the owners of the rancho Santiago de Santa Ana, which is situated upon the opposite side of the river, and which is in no manner alluded to in the Yorba deed. And even were this otherwise, it is clear that Yorba's deed could not affect the rights of the other owners of the Santiago rancho.

2. The title by prescription relied on by the plaintiff is based on the fact found by the Court below to the effect that from the 1st of January, 1858, until within a year or two prior to the commencement of this action, the plaintiffs, their predecessors, etc., quietly, openly, notoriously and continuously appropriated, used and enjoyed enough of the water of the river to keep their ditch, which was constructed in and over the strip of land described in the deed from Yorba to Ontiveras, flowing full to its utmost capacity at all times and seasons of the year, claiming the right and title

so to do, adversely to the whole world, and so diverted, appropriated, used and enjoyed the said water without let, hindrance or objection by any person whomsoever; and that the owners of the Santiago rancho, with knowledge thereof, stood by and made no objection. But the Court below also found that during the same time the water of the river was diverted, appropriated, used and enjoyed by the owners of the ranchos Santiago and Canyon for the irrigation of their respective tracts, and, further, that while the diversion and use of the water by the respective parties, and upon the respective ranchos and tracts of land as stated in the findings "has been done and claimed as of right, and claimed to be done adversely to all others, still, until within a year or two prior to the commencement of this action, there has been no interference of serious importance with the diversion, or attempted diversion, of any one by any of the others, there having, prior to that time, been sufficient water flowing in the river to supply the respective wants and demands of all the parties; but since then, that is, within a year or two prior to this suit, on account of the increased appropriations and diversions above the ditches of all the parties, water has become scarce and insufficient to supply the demands and necessities of all the parties. That except as to non-interference and failure to object under the circumstances aforesaid, there has never been any acquiescence or consent to the user of water as to any person, party or corporation, by the owners or claimants of any of the ranchos mentioned in these findings, or of any of the parties hereto or their predecessors or grantors. But ever since water has become scarce, as aforesaid, each party has respectively asserted and at all times attempted, as best they could, to maintain the rights as respectively claimed by them."

In the face of such facts as these, how can we be expected to hold that, as against the owners of the Santiago rancho, the plaintiffs have established any prescriptive right? In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party. This is thoroughly settled. Now it is very clear that while there was sufficient water flowing in the river to supply the wants and demands of all the parties, its use by one could not be an invasion of any right of any other; and as the Court below found, as a fact, that until within a year or two prior to the commencement of the action there was sufficient water flowing

in the river to supply the wants and demands of all the parties, it is plain that the plaintiffs as against the owners of the Santiago rancho have acquired no right by prescription.

3. As against the owners of the rancho Santiago, have the plaintiffs established a right to divert the water in question by reason of its prior appropriation and beneficial use?

This claim of the plaintiffs is negatived by the facts found by the Court beiow. As seen already, there was, according to the finding, sufficient water flowing in the river to supply the want and demands of the owners of each of the ranchos mentioned, until within a year or two prior to the commencement of this action in 1877. It also appears from the record that from an early day irrigation with the water of the river was carried on upon the rancho Santiago by its owners and their tenants. It was so carried on in 1857, when the conveyances from Ontiveras were made to the predecessors of the plaintiffs, under which the plaintiffs' ditch was constructed and sufficient of the water of the river diverted and appropriated to keep it flowing full to its utmost capacity at all times and seasons of the year, for the purpose of irrigating the Anaheim tract of 1,165 acres. But this appropriation by the predecessors of the plaintiffs was, according to the findings of the Court below, neither prior to the use of the water of the river by the owners of the Santiago rancho, nor did in any manner interfere with the use of it by the latter; for, according to the findings, there was then enough water flowing in the river to supply the wants and demands of *all* of the parties, and continued to be until within a year or two prior to 1877.

As observed already, the Court below found that at the time of the purchase by the predecessors of the plaintiffs from Ontiveras in 1857, and for years before, the owners of the Santiago rancho were and had been using the water of the river for the irrigation of their rancho; but the Court further found that prior to 1871 "said irrigation and cultivation was irregular both as to time and place and also as to ditches, some years more and some years less, at one place one year and at a different place another year, and during some years some of the ditches were not used, so that during some years not more than three irrigating heads, being each one hundred square inches under four inches pressure, were diverted and used during some years, and their ditches were often neglected and filled with weeds and dirt and their capacity at times greatly diminished, and such was their condition in 1857."

But that irrigation upon the Santiago rancho was, prior to 1871, "irregular, some years more and some years less,

at one place one year and a different place another year," and that during some years some of the ditches were not used, and other years some of them were neglected, is unimportant. The fact remains that the owners of the rancho did use the water of the river according to their wants and demands, and were so using three irrigating heads of it in 1857, and, further, there was at all times an abundant supply in the river for all parties until within a year or two prior to 1877.

It may be added that while the Court below found that the water diverted and appropriated by the predecessors of the plaintiffs in 1857, that is to say, sufficient of the water of the river to keep their ditch flowing full to its utmost capacity at all times and seasons of the year, for the purpose of irrigating the Anaheim tract of 1165 acres, "was then, ever since has been, and now is necessary for that purpose," it also found as a fact that the plaintiffs have sold water to parties on said Cajon rancho, *outside* of the Anaheim tract, "commencing about 1869, and gradually increasing said outside supply to about 600 or 800 acres, except in very dry seasons, as existing at the time of the diversions complained of, when *about* all the water in the ditch is necessary for the Anaheim tract."

These findings are not only inconsistent, but it certainly cannot be that water diverted and appropriated for the purpose of irrigating the Anaheim tract can be sold by the plaintiffs to supply other lands, to the injury of the owners of the rancho Santiago who, from a time long anterior to the purchase of the plaintiffs' predecessors, have been accustomed to use a portion of the water of the river for the irrigation of that rancho.

4. With respect to the estoppel relied on by the plaintiffs it is sufficient to say that, as the findings of the Court below show that there was sufficient water flowing in the river in 1857 and for nearly twenty years thereafter to supply the wants and demands of the owners of each of the ranchos bordering on the stream, the owners of the Santiago rancho were neither called upon to object to the diversion and appropriation by the predecessors of the plaintiffs, nor had they any right to object thereto. No right of theirs was interferred with. Nor does it appear that there was any fraud, misrepresentation or concealment of any kind practiced upon the predecessors of the plaintiffs by the owners of the rancho Santiago. In a recent case we had occasion to quote with approval what was held here in the case of *Biddle Boggs* v. *Merced Mining Co.*, 14 Cal. 368: "There must be some degree of turpitude in the conduct of a party before a Court of equity will estop him from the assertion

of his title—the effect of the estoppel being to forfeit his property and transfer its enjoyment to another."

The findings in this case show that the scarcity of water in the river that first made itself felt within a year or two prior to the commencement of this action, was caused by diversions made by parties above the highest ditch of any of the parties to this controversy. With the scarcity of the water arose disputes between the respctive claimants. It is not strange that this was so, for in the region in question, water for irrigation is essential to the proper cultivation and enjoyment of the land. Upon the Anaheim Tract as well as upon the Rancho Santiago numerous and extensive and valuable vineyards and orchards have been raised with the aid of the water of this river. Its continued use is all-important to all parties concerned. The plaintiffs, by virtue of the purchase of their predecessors from Ontiveras and their subsequent appropriation and use, are undoubtedly justly entitled to such portion of the water of the river appertaining to the Rancho San Juan y Cajon de Santa Ana as is sufficient for the proper irrigation of the Anahiem tract. Whether if the portion of the water appertaining to that rancho is insufficient for that purpose, the plaintiffs are entitled to enough of the water of the river appertaining to the rancho Canyon de Santa Ana to make good the deficiency, by virtue of the deed from Yorba to Ontiveras, we cannot now decide for the reason already explained. But as, for the reasons already given, the plaintiffs have acquired no right to any portion of the water that appertains to the owners of the rancho Santiago de Santa Ana, the decree of the Court below which secures to the plaintiffs sufficient of the water of the river to keep their ditch flowing full to its utmost capacity at all times and seasons of the year, without regard to the quantity of water that may be left in the river after such diversion and irrespective of the wants and necessities of the owners of the rancho Santiago de Santa Ana, cannot be sustained. We must therefore reverse the judgment and remand the cause for a new trial; In doing so, we think it not improper to suggest, in view of the value of the water in dispute and the large interests at stake, whether it is not advisable for the parties to the controversy to divide the water upon an equitable basis and devote the money that may otherwise be expended in litigation, in the proper development and judicious use of it.

Judgment and order reversed and cause remanded for a new trial.

I concur: Mryick, J.

I concur: I am of opinion that the plaintiffs have failed to make out any case for relief upon the grounds of prescription or estoppel *in pais*. The reasoning on these points in the opinion of Justice Ross is conclusive.

On whatever rules the rights of the parties herein are to be admeasured, whether by the rules applicable to appropriation, or those applicable to the common law doctrine of riparian rights, the rights of the parties are at least equal; neither has made out a claim superior to the other. There has never been any exclusive appropriation by plaintiffs prior to that of defendant, and the same may be said of the appropriation by defendant. I can see no exclusive appropriation by either party of the water of the stream, or any part of it. The use of the water has always been had by either party with the observance of the right of the other to a reasonable use of it for irrigation. Under these circumstances the parties must be held to have at least equal rights to use the water for the purpose indicated. The Court, therefore, in adjudging that the plaintiffs have, under all circumstances, the right to have their ditch flow full of water to the exclusion of the defendant, has violated the equality of right above mentioned, and has fallen into an error for which the case must be tried anew. The foregoing, in my opinion, is the substance of the able and elaborate opinion of Justice Ross, and I therefore concur in it. It is apparent that no question is made, in this case, as to the right to the use of the water for domestic purposes, and of course nothing is herein ruled in that regard. THORNTON, J.

The case as made out in the Court below, failed to establish an exclusive right of ownership arising out of prescription or estoppel, in the water of the Santa Ana river, to the extent claimed by the plaintiffs.

In my judgment, the rights of the respective parties originated in a riparian source, are held by them in common, and invest each with equal rights to the use and enjoyment of the water of the stream. Being held in common, it is well settled that in a controversy between such owners as to their rights, it is the duty of a Court of Equity to determine the respective rights of the parties so as to give to each the just proportion to which he may be entitled, and if necessary, regulate the use between them according to their rights. (*Lyon* v. *McLaughlin*, 32 Vt., 423; *Arthur* v. *Case*, 1 Paige, 447; *Belknap* v. *Trimble*, 3 *Id*, 601; *Webber* v. *Gage*, 39 N. H., 182; *Bardwell* v. *Ames*, 22 Pick., 353; *Ballow* v. *Hopkinston*, 4 Gray, 324; *Booth* v. *Driscoll*, 20 Conn., 555; *Brown* v. *Ashley*, 16 Nev. 316.) That the principle was not observed in the adjudication of this case, and I agree that the judgment should be reversed and the cause remanded for a new trial. MCKEE, J.

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Current Topics.

CHIEF JUSTICE COLERIDGE.

At the reception tendered to Chief Justice Coleridge at St. Louis, the learned jurist, after a few preliminary remarks, spoke as follows:

"I cannot express adequately how much I sympathize and agree with you—that law grows, that while its principles remain unchanged, the application of them must change with changing times; that the English common law is broad as the race, as diverse and elastic as the various peoples of which that race is composed, and that its wisdom and profundity are as inexhaustible as our language. These things I have earnestly believed, am convinced of, and according to my power, have from time to time, sought to maintain in argument and exemplify in practice.

"But, gentlemen, our common law has had great dangers. The wise and broad liberality of Lord Holt and of Lord Mansfield would have antedated many of those salutary changes now embodied in the law, had it not been for the narrow and unbending learning of Lord Kenyon and Lord Eldon, which postponed them for nearly a century, and in the same way the broad and manly sense of the judges of the queen's bench and the common pleas, in the times of Lord Denman and Lord Campbell, were overthrown and carped at by a great lawyer, indeed, but a man of the most narrow technicality, who, when I was young, dominated Westminister with the most absolute and despotic sway. I mean Baron Parke, afterward known as Lord Windsordale. He was a man who used to rejoice in nonsuiting a plaintiff in an undefended cause, *i. e.*, in doing what, by the very nature of the case, was unjust. He resisted with the ut-

most of his ability the very slightest attempts that were made to allow amendments to the pleadings. 'For,' said he, 'good heavens! think of the state of the record.' That was the parchment, the clients were nothing, and he sought most deliberately to outstrip and defeat the intentions of the English Parliament in 1852–4, to introduce something of equitable breadth into our common law proceeding as it stood at that time. And he succeeded. I should be sorry to think that this was a fair description of every thing at that time, but I remember a very great lawyer (I don't know whether his name has reached this side of the Atlantic in the honor and distinction it ought to hold) Mr. Justice Maule, one of the most powerful intellects I ever knew, and of great ability as a satirist—I remember hearing him once say in court to a gentleman who was arguing at the bar, 'Well, that seems a horror in morals and a monster in argument; now, the case in Meeson & Welsby lays it down as law.' I do not want to say a word against the moral worth and intellectual force of these men. They were good men and men of extraordinary power. If they had not extraordinary power they would never have done what they did, because I have always maintained that in law, in morals, in politics, in everything that should please, a man to do much mischief must be an able rather than a good man.

"But the common law happily has survived these dangers; it has survived to guard our freedom—our freedom with its own great majesty; it has survived to be one among the many links which I hope bind England and America indissolubly together. England is, in a certain sense the mother and America is the child, and the mother, like other mothers, suffered many pangs and much sorrow at the birth of her child. But, now all these have passed away. She remembereth no more the sorrow in the joy and pride with which she looks upon the greatness and the glory of what she has brought forth."

RECENT DECISIONS AS TO SURETIES. (CAL. SUP. COURT.)

The Court will not allow a supplemental answer to be filed, pleading a discharge in bankruptcy, where an attachment had been levied more than four months before the filing of the petition in bankruptcy, and the property had been released by giving an Undertaking on release of attachment. In such case the sureties are liable. *Harding* v. *Minear*, 54 Cal. 507., (*per contra*, 100 Mass. 453: 114 *id.* 543; 116 *id.* 527; 117 *id.* 343; 119 *id.* 159; 71 N. Y. 468: 7 Bush. (Ky.), 348; 17 N. B. R. 287; 15 Blatchf. C. C. Rep. 466; 99 U. S. 8; Drake on Attach. 341 (*b*); Bailies on Sureties and Guarantors, 277).

Sureties on an Undertaking on Release of Attachment are liable, though their principal filed his petition in bankruptcy within four months thereafter, if he allows judgment to be taken against him by not pleading his bankruptcy. *Goodhue* v. *King*, 55 Cal. 377.

Sureties upon an Undertaking on Appeal are released from all liability thereon by a tender of the amount for which they are bound. *Sharp* v. *Miller*, 57 Cal. 415; 7 Pac. C. L. J. 554.

A surety on a *joint* and *several* bond is not released by failure of one of the sureties named to sign, unless he so stipulated, (*per contra*, as to *joint* bonds), *Los Angeles* v. *Mellus*, 8 Pac. C. L. J. 753; 59 Cal. 444.

When one surety receives the money to pay the debt secured, and does not so apply it, his co-surety, on paying the debt, has an action against the former for money paid to his use. *Logan* v. *Talbot*, 59 Cal. 652; 9 Pac. C. L. J. 80.

An action will not lie against sureties on an Undertaking on Attachment until a demand and refusal on the part of their principal to pay, and both must be pleaded. *Morgan* v. *Menzies*, 60 Cal. 348; 9 Pac. C. L. J. 294.

When a party to a note seeks to set up as a defense that he signed only as a surety, he must aver and prove that the payee of the note both knew of this fact and consented to deal with him as such. *Farmer's Nat. Gold Bank* v. *Stover*, 9 Pac. C. L. J. 306; 60 Cal. 392; *Harlan* v. *Eli*, 55 Cal. 340.

Sureties on the bond of an administrator are concluded by a decree of the Probate Court settling the administrator's account. *Chaquette* v. *Ortet*, 60 Cal. 598; 9 Pac. C. L. J. 602.

A judgment may be entered against sureties on an appeal bond, given to stay the execution of a judgment directing the payment of money without notice upon affirmance of the judgment and failure on the part of the principal to pay the judgment within thirty days after the filing of the remittitur. *Meredith* v. *S. C. M. A. of Baltimore*, 9 Pac. C. L. J. 609; 60 Cal. 617; *Parnell* v. *Ladd*, 57 Cal. 232; *Wood* v. *Orford*, 56 Cal. 157.

An Action against sureties on an injunction bond conditioned that surety would pay if Court finally decided that injunction would not obtain, is premature if brought before final judgment. *Clark* v. *Clayton*, 10 Pac. C. L. J. 344.

SPECIAL LEGISLATION.

[Read before the Young Men's Bar Association by H. A. Powell, Esq.]

Under the English system from which we derived the framework of our laws, the legislative power was without limitation. Sir Edward Coke said (4 Inst. 36) that the power and jurisdic-

tion of Parliament was so transcendent and absolute that it could not be confined either for persons or causes within any bounds. Matthew Hale, speaking of the Parliament, observed: "This being the highest and greatest court over which none other can have jurisdiction in the Kingdom, if by any means a misgovernment should fall upon it, the subjects of this Kingdom are left without all manner of remedy." Blackstone says that what Parliament doeth no authority on earth can undo. It can in short do everything that is not naturally impossible, and therefore some have called its power "the omnipotence of Parliament." (1 Bl. Com. 160.)

In the American system unlimited legislative power is unknown. (*Land As.* v. *Topeka*, 20 Wall. 663.) Even in the colonial period of our history the charters and fundamental constitutions, under which the colonies were governed, placed many and burdensome limitations upon the power of the people. These old charters and constitutions form an interesting subject to the student of legal history; some containing many queer and ludicrous limitations, such for example as that found in the Constitution of Carolina, framed by the philosopher John Locke in 1669, wherein it is ordained that to avoid multiplicity of laws all legislative acts shall at the end of a hundred years after their passage cease and determine of themselves without any repeal, and that since multiplicity of comments only serve to obscure and perplex all manner of comments and expositions on the constitution, common or statute laws are absolutely forbidden.

It may be stated that at no period in the Anglo-Saxon history of the United States have the peole exercised that unlimited legislative power which is inherent in the people. During the colonial period this deprivation of power was mainly involuntary, but, under the Confederation and Constitution, the people, "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty" delegated a portion of their inherent power to the General Government. And for like reasons by the adoption of State Constitutions they have surrendered still other legislative powers. And thus by their own direct and voluntary acts they have placed limitations upon their powers in such manner that a lawful change is possible only by conservative constitutional methods.

The evil of unrestrained and omnipotent powers in one body was so well and universally understood at the close of the war of the Revolution that the Constitution of the United States, as well as the State constitutions, divided the powers of Government into the three co-ordinate departments, legislative, executive and judicial. So accustomed however had been the legislative power, the world over, to apply the law as well as to make it that the encroachment of the leislative upon the judicial has been, in the United States, fruitful of much litigation. And, indeed it will be observed, to the credit of the judiciary, that the inherent legislative power of the people has been upheld to such a degree that it is an established American rule that in every case where the limtiation is not clear, legislative enactments must be held valid; and when there is a reasonable doubt whether an act is repugnant to the Constitution, Courts must pronounce in favor of its constitutionality. It is an old legal maxim that the law hateth new inventions and innovations. It is the moderate observance of this maxim that gives the judiciary its conservatism; and the conservatism of the judiciary is the strength of a nation. Referring to the constitutional provision that no local or special law shall be passed where a general law can be made applicable, Justice Cooley intimates that so stringent a provision would, in some cases, lead to the passage of general laws of doubtful utility in order to remedy the hardships of particular cases. (Cooley's Con. Lim. 155.) In *Brooks* v. *Hyde*, 37 Cal. 379, in comnenting upon the fact that there was no provision in the Constitution of this State at that time which prohibited the passage of either local or special laws, except in respect to the formation of corporations, (and he might have added except in divorce matters,) Justice Sanderson says that such a provision would be in many respects prejudicial to the local wants of the people and would have placed it beyond the power of the legislature to meet and provide such unforseen conditions as are sure to arise, and would have led to all manner of mischief and so hampered the legislature as to have precluded the passage of indispensable laws or to have made necessary their extension merely for the sake of form to localities and cases where they could have no beneficial operation.

While, however, this conservatism has been very properly maintained, the people have been gradually awakening to the

self evident truth that it is the province of the courts after a full hearing and a judicial investigation to determine what is the law upon special existing cases, and that not only all general laws should have a uniform operation but that in all cases where a general law can be made applicable no local or special law should be passed. One authority says, *that* is not legislation which adjudicates in particular cases, prescribes the rule contrary to the general law and orders it to be enforced; such power assimilates itself more closely to despotic rule than any other attribute of government. (Ervine's Appeal 16 Penn. St. 266.)

In the absence of constitutional limitation, it is no objection to a statute that it is special or local in its effect. (*Orr* v. *Rhine*, 45 Tex. 345; *Beyman* v. *Black*, 47 Tex. 558; *People* v. *C. P. R. R. Co.*, 43 Cal. 398.) In the constitutions of but six States in the Union, Connecticut, Delaware, Massachusetts, New Hampshire, Rhode Island and Vermont, is there no limitation upon the legislative power to pass local or special laws. In every other State there are found limitations of this character more or less stringent in their nature. The subject of legislative divorces exercised the minds of the people at an early day. The first limitation upon legislative divorces is found in the Mississippi Constitution of 1817, the year that State was admitted into the Union. It declared that divorces shall not be granted but in cases provided for by law, and a peculiar proviso was added that no decree for such divorce shall have effect until the same shall be sanctioned by two-thirds of both branches of the General Assembly. In 1832 the proviso was annulled, and ever since legislative divorces have been unknown in Mississippi. Alabama in 1819 adopted a similar provision but retained the proviso requiring the sanction of the Legislature till 1865. An amendment to the Constitution of Georgia adopted in 1833 does not expressly forbid special legislative action in divorce matters but makes the novel provision that divorces shall be final and conclusive where the parties shall have obtained the concurrent verdicts of two special juries authorizing a divorce upon legal principles. Before 1850, the following states had constitutional inhibitions against special legislation in divorce matters: Tennessee in 1834, Michigan in 1835, Arkansas in 1836, New Jersey in 1844, Louisana and Texas in 1845, Iowa in 1846 and Illinois and Wisconsin in 1848. Since 1850, all the states of the Union have adopted sim-

ilar inhibitions with the exception of Maine and the six States already mentioned as having no restrictions as to special or local legislation. The weight of authority undoubtedly is that the Legislature has complete control over these matters unless specially restrained by the state Constitution. Chancellor Kent (2 Kent, 106) suggests, however, that the question of divorce involves investigations which are properly of a judicial nature and ought to be confined exclusively to the judicial tribunals. And Justice Cooley remarks (Const. Lim. 113) that if the questions could originally have been considered by the Court, unembarrassed by any considerations of long acquiescence, it is highly probable that these enactments would have been held to be usurpations of judicial authority and we should have been spared the necessity of the special constitutional provisions which have since been introduced.

Arkansas is the pioneer State in curtailing the Legistature in the enactment of special laws conferring corporate powers. In 1836 it adopted the sweeping measure that no special act conferring corporate powers shall be passed. The next State to come up to this standard was Ohio in 1851, followed by Minnesota in 1857. There are even now but eight States which have adopted this salutary measure, viz: Arkansas, Ohio, Nebraska, Pennsylvania, Tennessee, West Virginia, Minnesota and California. There are but seven States, however, without any constitutional restriction upon this subject. The State of Deleware, although having no limitation upon the enactment of special laws, was the first to adopt restrictive constitutional measures in the matter of the organization of private corporations. In the Constitution of 1831 it was provided that no act of incorporation, except for the renewal of existing corporations, shall be enacted without the concurrence of two-thirds of each branch of the Legislature. Michigan, in 1835, adopted a similar measure.

The enumeration of the various limitations upon legislative authority to pass special or local laws does not come within the scope of these comments. In some States no local or special law can be passed without public notice is given (in a mode prescribed) before the introduction of the bill. In others the subjects upon which local or special legislation is forbidden are specifically mentioned. While still another class provides, as in Sub. 33, Sec. 25, Art. 4 of the Constitution of California, that

in all cases where a general law can be made applicable, no local or special law shall be passed. Thirteen States (*) belong to the latter class. Iowa, in 1846, was the first to adopt this measure. Virginia has made the needless declaration that no special law shall be passed where the Courts have jurisdiction except when in the judgment of the Legislature general laws will not answer, which virtually leaves with the Legislature the same powers it had before. It will be observed that there has been an accelerated movement among the people of the United States, commencing more than a generation ago, to confine the law making department to general legislation; and, although it may be true that individuals and localities will frequently suffer some hardship, there has been adopted no other measure in any age that has a greater tendency to maintain equal rights and to protect the poor and the weak from the wealthy and the powerful. What the masses of the people need is to be permitted and to be taught to depend, for their comfort and well-being, on their own energy and the impartial laws of political economy. Government is a necessary evil and its machinery should be reduced to a minimum; its only legitimate aim is to provide security for the person and property of its citizens, and when anything outside of this is attempted, inequality begins and the poor and the weak suffer in the end. If the granting of special favors or advantages are within the gift of the law-making power, human nature is so constituted that wealth and influence will always reap an undue share. Might it not have been better if the Constitution of the United States had been so framed as to forbid special legislation by Congress on many of the important subjects within its jurisdiction. If it had been required that all laws making any disposition of the public lands should be, in the broadest sense, general and uniform in their operation, the result would have been infinitely to the advantage of the people. Special legislation in the way of Government aid and subsidies are foreign to the legitimate powers of true government, and taking centuries together, are highly detrimental to the greatest number. The charge in the Declaration of Independence against the King was that he had refused his assent to laws necessary for the *public* good. A charge that he had refused his assent to laws necessary for the convenience or

(*) Iowa, Indiana, Missouri, Kansas, Nevada, Maryland, Illinois, West Virginia, Texas, Arkansas, Nebraska, Colorado and California.

welfare of individuals or localities, would have caused derision and contempt. The sudden development of trade or the resource of a State or of a locality, by railroad grants or any other species of special legislation, is unnatural and invariably results in great and undue individual wealth and national as well as sectional discontent.

Where a statute comes within the enumerated forbidden subjects, the only question for the Courts to determine is whether or not the statute is general. This is frequently a difficult question and has caused much judicial controversy. The terms *general* and *special*, as now applied to laws, are of comparatively recent origin and are by no means convertible with the terms *public* and *private* laws. A public law is one which affects the public, and may be either general, special or local; general, if it bears equally upon all persons and things standing in the same category; special, if not; and local, if affecting the public of a circumscribed territory less than the whole over which there is jurisdiction. A private law is of course always special in its character.

In *Smith* v. *Judge*, Twelfth District Court, 17 Cal. 556, the Court say: "The effect of laws of a general nature shall be the same to and upon all; but who are the *all* who are subjects of this operation. Obviously, the answer is, all who stand in the same relation to the law; in other words, *all* the facts of whose cases are in substance the same." This language has been approved in *Bourland* v. *Hildreth*, 26 Cal. 161; *Jackson* v. *Shawl*, 29 Cal. 271; *Brooks* v. *Hyde*, 37 Cal. 366; and others. These cases arose under the provision that "all laws of a general nature shall have a uniform operation" in the Constitution of 1849, which, as already observed, did not prohibit special legislation except in divorce matters and in the creation of corporations other than municipal. Since the adoption of the Constitution of 1879, in which we find thirty-two enumerated subjects upon which local or special legislation is forbidden, besides the subdivision forbidding the same in all other cases where a general law can be made applicable, the question as to whether a law is general or special or local has become vastly more important and much more frequent in occurrence, and must in the future become of great interest to the Bench and Bar.

Desmond v. *Dunn*, 55 Cal. 242, is a case in which the construction of Section 6 of Article 11 of the present Constitution was involved. It provides that corporations for municpal purposes shall not be created by special laws. The act in question provided for the organization of merged and consolidated cities and counties of more than 100,000 population. It was held to be a special law and therefore unconstitutional; because (1) it applied to municipal corporations consisting of consolidated cities and counties only, and (2) it was limited to municipal corporations having more than 100,000 inhabitants. The Court say that any general law must be as broad as the subject to which it relates. A similar conclusion was reached in *Earle* v. *The Board of Education*, 55 Cal. 489, concerning an Act relating to salaries of school teachers in cities having 100,000 inhabitants or more. The provision of the Constitution this Act was held to violate was one forbidding the passage of local or special laws for the management of common schools. (Sub. 27, Sec. 25, Art. 4.) Justice Ross in the prevailing opinion holds the Act to be local. Justice Myrick, concurring, is of the opinion that it is special legislation, and adds the following pertinent language: "By Sub. 33 (same section) the Legislature is prohibited from passing a special or local law in all other cases where a general law can be made applicable. Cannot a general law fixing salaries or prescribing a mode for fixing salaries be made applicable to the entire State"? Justices Thornton and Sharpstein dissent on the ground that the Act does not provide for the management of common schools and that it is not local or special in its character.

A very clear and comprehensive definition of the term general law will be found in *Ex parte* Westerfield, 55 Cal. 550. It was held that the Act making it unlawful for any person, conducting the business of baking, to engage or to permit others in his employ to engage, in the labor of baking for the purpose of sale between the hours of 6 P. M. on Saturday and 6 P. M. on Sunday, was special legislation and in conflict with Sub. 2 of said Section 25 of the Constitution, which forbids the passage of special laws for the punishment of crimes and misdemeanors. Justice McKinstry in his concurring opinion says: "*A general law must include within its sanction all who come within its purpose and scope. It must be as broad as its objects.* * * * *To say that every law is general within the meaning of the Constitution which*

bears equally upon all to whom it is applicable is to say there can be no special laws." In the recent case of *Hewlett* v. *Epstein*, 11 P. C. L. Journal 71, "An Act for the better protection of stockholders in mining corporations," which provided a penalty to be imposed upon the directors for each failure to make and post in the office of the company on the first Monday of every month an itemized account of the transactions of the company, was held to be constitutional. The Act was passed in 1880, and the action was to recover from the directors the penalty prescribed for their failure to make and post such account. It was contended on the part of the defendants that the law is special legislation because confined to the protection of stockholders of mining corporations only. In other words, that it does not include within its sanction all who come within its purpose and scope; that it is not as broad as its object; that the purpose, scope and object of the Act is the protection of stockholders against the negligence, ignorance or fraud of directors; that the protection of all stockholders standing in substantially the same position as those of mining corporations is included within the scope of the Act; that the Act extends protection and privileges to the stockholders of mining corporations, which it denies other stockholders equally entitled to the same, and that it imposes burdens upon the directors of mining corporations which are not imposed upon other directors holding and exercising precisely a similar trust. In short, that a general law could have been made applicable so as to include all stockholders and directors coming within its scope and object.

It appears that the Court affirmed the judgment in favor of the defendants on a question of pleading, and merely adds the following at the close of the opinion: "We are of the opinion that the act in question is not a violation of any provision of the Constitution." Whether the Court found the Act to be a general law or that a general law could not have been made applicable is not explained.

Under the general clause prohibiting local or special legislation where a general law can be made applicable, another question is presented upon which the authorities do not agree. It is whether the passage of a local or special law by the Legislature is conclusive that a general law could not have been made applicable. Can the Courts inquire as to whether a general law

can be made applicable? The proposition was answered in the affirmative, in a well considered case in 1854, by the Supreme Court of Indiana. The Act was to relocate the seat of justice of the county of Clay. It was held to be special legislation and a case which could be made the subject of a general law, and, therefore the Act was held void and unconstitutional. (*Thomas The Board of Commissioners*, 5 Ind. 4.). In 1859 the Iowa Supreme Court followed the reasoning of this case in *ex parte* Pritz, 9 Iowa, 36. The first case which militates with this view is *State of Kansas* v. *Hitchcock*, 1 Kansas, 184. There it was held that it was for the Legislature to decide whether a general law could be made applicable. It is doubtful if the reasoning in this case can meet with any lasting favor, although I observe that it has been quoted with approval. The decision seems to be based mainly on the ground of the inconvenience and detriment which would result from holding the Statute under consideration void. The Court say: "Even if a general law could be made applicable, it would bring on distracting contests and make the general effect highly injurious." The general principle is that Courts are not justified in taking into consideration questions of convenience or policy when construing a law, whether constitutional or statutory. Again, the opinion says: "Whether the Court could, in any conceivable case presenting a flagrant abuse of discretion by the Legislature, hold a private law invalid, we do not here decide." Where discretion in the Legislature is admitted its judgment is supreme. The legislative department makes the law and is accountable to no other power for indiscreet or impolitic legislation. The Constitution alone is its master; and if a limit is placed by the Constitution upon legislative action there is no longer any discretion in the Legislature. There is either discretion in the legislative department from which there is no appeal, or there is no discretion at all. The opinion in this case further holds that the clause under consideration is in its nature directory rather than mandatory. The office of the provision is to limit the power of the Legislature. If it is directory it is no limitation and as a constitutional inhibition it is valueless and superfluous. Justice Cooley says Courts tread upon dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. (See Const. Lim. 78, 140, 150.) The provision

in the Constitution of Kansas is found in Sec. 17, Art. 2. The section reads as follows: "All laws of a general nature shall have a uniform operation throughout the State; and in all cases where a general law can be made applicable no special law shall be enacted." In *Darling* v. *Rodgers*, 7 Kan. 592, the first part of the section is held to be mandatory. Thus we have two clauses in the same section equally positive in their terms, one of which is held to be mandatory and the other directory.

In *Gentile* v. *The State*, 29 Ind. 409, the Court recedes from its position in *Thomas* v. *The Board of Commissioners*, and holds that "An Act for the protection of fish in the waters of the State, *excepting* the Ohio and St. Joseph's Rivers," is constitutional and valid, on the ground that it is for the Legislature alone to judge whether a law on any subject not specifically enumerated can be made applicable to the whole State. *State of Kansas* v. *Hitchcock* is cited with approval. Otherwise, the opinion is ingenously and carefully prepared, but falls far short of being satisfactory, assuming as it must that the constitutional provision is merely directory. In *Marks* v. *Trustees of Perdue University*, 37 Ind. 164, the question is considered settled by the Gentile case; and in *State* v. *Tucker*, 46 Ind. 355, the Court in its prevailing opinion refuses to enter into an examination as to which is the better rule, the one in *Thomas* v. *The Board of Commissioners*, or that in the Gentile case, "being at all times opposed to overruling cases without a strong necessity for so doing." There is a dissenting opinion, however, to the effect that the rule in the latter case, and the subsequent decisions adhering thereto, abrogate the provision of the State Constitution and that the true construction is given in *Thomas* v. *The Board of Commissioners*.

A novel case on this subject is that of *Hess* v. *Pegg*, 7 Nev. 23. The Act under consideration was one removing the county seat of Washoe County from Washoe to Reno. The doctrine of *Thomas* v. *The Board of Commissioners*, to the extent that the judgment of the Legislature is not conclusive is approved for the reason that the provision in the Constitution of Nevada was borrowed from the Constitution of Indiana after the Supreme Court of that State, in the last named case, had put a construction upon it, recognizing the well known rule that the construction put upon language is deemed to be adopted with the language. Inexplicable as it may seem, the Act was held constitu-

tional nevertheless, for the reason that a general law could not be made applicable. The construction put upon the language in a similar Act, in *Thomas* v. *The Board of Commissioners*, was to the effect that a general law could be made applicable and that just such legislation was what the Constitution intended to prohibit. Besides, it appears from the opinion there was a general law in force at the time of the passage of the Act providing the manner for removal of county seats. The Court adds "that the decision as to whether or not a general law can be made applicable is primarily with the Legislature; and its decision though subject to review by the Courts will be presumptively correct." It is to be supposed that what is meant by the last sentence is that legislative action will not be held unconstitutional in cases where there is a reasonable doubt. Justice Garber dissents from the judgment.

Another curious case is found in the Iowa decisions. (*State* v. *Squires*, 26 Iowa, 340.) The holding of the Court is that while it would not be competent for the Legislature to pass a special law incorporating Epworth School District, it has the power to pass a special curative Act legalizing the defective organization of the Epworth School District, for the reason that a general law cannot be made applicable so as to afford any remedy for the evil. It is not plain that any act was required to remedy the evil. If the District had been defectively organized under a general law all that was necessary was for the District to *effectively* organize under the same law.

In Missouri the people seem to have been determined to surrender their inherent right to pass special laws; while the Courts with equal determination have insisted that the provision was merely directory, binding upon the consciences of legislators only, and if disobeyed, that the Courts could furnish no remedy. *State* v. *County Ct. of Boone*, 50 Mo. 317; *State* v. *County Ct. of New Madrid*, 51 Mo. 82. The former was decided in the July Term, 1872. Justice Wagner in his dissenting opinion asserts special legislation to be one of the great evils of the day, and claims that the judgment of the Court practically nullified the Constitution and blotted out one of its most salutary provisions. In the latter case, decided in the October Term of the same year, the Court was urged to reconsider its conclusion. This it refused to do. The people then, at their first opportunity in the Constitution of 1875, put the question at rest by adopting

a provision that "whether a general law could have been made applicable in any case shall be a judicial question, and as such shall be judicially determined without regard to any legislative assertion on the subject. (Art. 4, Sec. 53.)

There is no express adjudication in this State as yet upon this vexed question. It was evidently in view of these conflicting decisions that Section 22 of Article 1 of our Constitution was inserted; which declares that its provisions are mandatory and prohibitory unless by express words they are declared to be otherwise. In *Earle* v. *The Board of Education, supra*, it was intimated by the Court, though not decided, that this declaration might preclude the Court from holding that the judgment of the Legislature was conclusive.

It will be the verdict of posterity that the crowning feature of the present Constitution of California is its limitations upon local and special legislation. Under it, bulky volumes of statutes have disappeared; a greater feeling of security prevails during legislative sessions; diligent watch of legislation at the Capital by citizens from all parts of the State to prevent the granting of special rights or privileges to others or the imposition of special burdens upon themselves, is made unnecessary; and the nefarious business of lobbying must of necessity be reduced to much smaller proportions. It is the manifest duty of the Courts to give full effect to the plain declaration of the people that the Legislature shall not pass any local or special law if a general law could have been made applicable. The rule that where there is doubt legislative action will not be held invalid, need not be modified in the least; but if the Courts hold this provision as merely directory upon the Legislature, consistency would require them to make a similar holding as to the limitations in Section 16, Article 1, which provides that no bill of attainder, *ex post facto* law or law impairing the obligations of contracts shall ever be passed.

A CORRECTION.

In XII Pacific Coast Law Journal, 58, we published an article from the *Legal Advertiser*, Chicago, entitled "Standard Instructions on the Subjects of Comparative and Contributory Negligence." The article appeared in, and was taken from, the *Legal Adviser* of Chicago. Owing to the similarity in name we ought to be excused. We do not, however, ask it, because there is no excuse for mistaking a *legal advertiser* for a *legal adviser*.

Supreme Court of California.

IN BANK.

[Filed September 28, 1883.]

No. 8478.

L. CORNELL, RESPONDENT,

v.

FRANK CORBIN, GEORGE W. HANDY, AND THE INDIAN VALLEY MINING CO., APPELLANTS.

FRAUD—EQUITABLE RELIEF—FORECLOSURE OF MORTGAGE. Action to foreclose a mortgage on a mine. One Cornell sold the property to defendants Corbin and Handy, for the sum of $100,000.00, one-half cash, the balance in two notes secured by mortgage, and a portion of the stock of a corporation to be organized to work the mine. Defendant Corbin paid the money and one of the notes. It was a part of said agreement that the defendant, the Indian Valley Mining Co., should be formed for the purpose of working the mine, and that Corbin and Handy should convey to it; which was done. Corbin averred that he was induced to enter into the agreement by fraudulent representations made by Cornell, and asked relief. No judgment for deficiency was prayed for against Corbin. The Court sustained a demurrer to Corbin's answer.

Held, (1). That the plaintiff (assignee of Cornell) stands in the same relation to the defendants as her assignor, the assignment having been made after the maturity of the notes and without value.

(2.) The corporation being formed for the purpose of carrying out the agreement between the parties, it stands substantially as a trustee, and Corbin being a stockholder is entitled to relief notwithstanding the conveyance to the corporation.

Appeal from Superior Court, Plumas County.

W. S. Goodfellow and *R. H. F. Variel* for respondent.
J. D. Goodwin and *D. W. Jenkins* for appellant.

This is an action to foreclose a mortgage alleged to be held by the plaintiff, assignee of George P. Cornell, for $25,000, to whom the notes and mortgages were executed by the defendants Corbin and Handy. The date of the assignment to plaintiff as stated in the complaint is a day subsequent to the maturity of the notes. The complaint alleges that the defendant corporation has some interest in the mortgaged premises subject to the mortgage. During the pendency of the proceedings the complaint was amended by stipulation, by striking out the name of defendant Corbin in the prayer that judgment for deficiency be docketed.

The defendant Corbin and the Indian Valley Mining Company answered, denying the assignment to plaintiff, and that she is or ever was the owner of the notes or mortgage. For a further defense, and by way of set-off, the same defendants, in their answer, averred in substance, among other matters, the following: George P. Cornell being the owner of the undivided one-half of a mine, undertook to obtain title to the other undivided one-half, and to convey the mine to Handy and Corbin upon the payment to him by them of one hundred thousand dollars, he (Cornell) to have a certain amount of the stock of a corporation to be thereafter organized. The agreement as to the payment was subsequently modified so as to make the payment to be, money $50,000, and $50,000 by notes and mortgage. (The two notes in suit are for the last $25,000, the first note for $25,000 having been paid.) The answer contains averments of specific acts of fraud on the part of Cornell and Handy, by and through which Corbin was induced to join in the purchase and to pay two-thirds of the first payment of $50,000, and to expend $50,000 in the working of the mine. It is averred that it was agreed, as parts of the transaction, that Handy and Corbin should proceed to the Eastern States and procure a corporation to be organized, and that the mine should be conveyed by Corbin and Handy to such corporation, each of the parties, Cornell, Corbin and Handy to have named proportions of the shares of the stock. In pursuance of this arrangement, the defendant, The Indian Valley Mining Company, was incorporated, and, after the execution of the notes and mortgage for $50,000, the mine was conveyed to it. No stock of the corporation has been issued, but the parties still retain their respective interests as agreed upon.

For the purposes of this decision we regard the assignment of the notes and mortgage in suit, from George P. Cornell to the plaintiff, his wife, as having been made after maturity and without value, and that the plaintiff must be regarded as George P. Cornell would have been regarded. We also deem the acts of fraud averred in the answer to be sufficient to justify relief, if Corbin and Handy still retained the title to the mine and were the only defendants. The question, then, for consideration, is, has the creation of the corporation, and the conveyance to it of the title, since the execution of the mortgage, so far changed the relations of the parties to each other and to the property, as that no relief can be afforded?

The plaintiff asserts: 1. As to the defendant Corbin, by the complaint as amended, no judgment was sought against

him which could, in any way, operate to the injury of his legal rights; by reason of his conveyance to the corporation he had no estate or interest in the land which could be affected by the decree; he had no interest in the controversy, and was not therefore in a position, either in his own behalf or jointly with the corporation, to set up matters of defense as alleged in the answer. 2. In respect of the corporation, such title as it has was acquired subsequent, and is subject and subordinate to the mortgage; the corporation therefore in effect, acquired such interest in the property as would remain after satisfying the mortgage; in this view, the foreclosure proceeding is not an attack upon its property rights, and it cannot deny the validity of the debt; whatever may have been the fraudulent practices of Cornell and Handy upon Corbin, the corporation has had no dealings with Cornell, and it has no counter-claim or off-set, nor any damage to recoup.

It might perhaps, be conceded, if the corporation was an independent existence, having no relation to the parties or their purposes or agreements, these assertions would be entitled to weight; but, in cases like the present a Court of Equity reaches beyond the form and shadow of things and grasps the substance. In this case the formation of the corporation was a part of the transaction at its inception, and its existence was used to carry out the plan. We can repeat, with reference to the facts of this case, what was said by this Court with reference to the facts in *Shorb* v. *Beaudry* (56 Cal. 446), that the corporation was formed as a mere agency for more conveniently carrying out the agreements between the parties, is sufficiently apparent; as a corporation, it paid nothing and incurred no liability; the profits, if any, would be distributed among the three parties in the proportion of the shares of stock held by them according to the contract; no certificates of stock had been issued, but the ownership of the shares remains in first hands. The relation which the corporation sustained to Cornell, Handy and Corbin was substantially, if not technically, that of a trustee; substantial justice can be administered in this case by treating the parties in the light of their agreements between themselves, independently of their incorporation, and in no other way that we have been able to discover can this be done.

Corbin, by means of fraudulent representations made by Cornell and Handy, was induced to enter into a contract whereby he was to pay, and in pursuance of which he did pay $33,000. It was further agreed that in consideration

that Cornell should convey the mine (through Corbin and Handy) to a corporation to be formed, the corporation in effect to assume a mortgage to Cornell for $50,000, $25,000 whereof has been paid. Corbin, in consideration of his assent that the deed should be made to the corporation (through him and Hendy) and that the corporation should pay the amount secured by the mortgage in order to relieve its assets of the lien, was to receive a certain share of the stock of the corporation. When formed the corporation became a party to the agreement. The fraud practiced on Corbin was the inducing him to receive, in return for his money, a share of the stock of the corporation laden with the lien of the mortgage. If he has a right to relief at all, by way or recoupment, by reason of the fraud, he can seek it only by asking that the assets of the corporation (and thus his shares of the stock therein) be relieved of the balance of the mortgage. Admitting that his stock in personal property, and that he has no equitable estate in the *land* conveyed to the corporation, will equity refuse him help for that reason?

In *Jones* v. *Bolles* (9 Wall. 364), it was held a *stockholder* could enjoin the setting up of a claim for purchase money against the lands of a company (corporation) whose capital stock was divided into shares—the vendor having induced the stockholder to take the stock by a promise not to assert his claim for the purchase money.

The effect of the foreclosure of plaintiff's mortgage against the company must be to depreciate the value of Corbin's stock.

The answer shows that Corbin owned *all* the stock—except that belonging to Cornell and that claimed by Handy.

The corporation was a proper party—because, 1st—it held legal title to the mine, and 2dly—it was a proper party to the answer of Corbin, although the relief prayed was in its favor. (*Jones* v. *Bolles*, *supra*).

The judgment is reversed, with instructions to overrule the the demurrer to the answer of the defendants Corbin and the Indian Valley Mining Company.

We concur: McKinstry, J., Ross, J., Thornton, J.

DISSENTING OPINION.

I dissent. It appears that the mortgage sought to be foreclosed was executed by the defendants Corbin and Handy to plaintiff's assignor, G. P. Cornell, and that after the execution of the mortgage and before the commencement of

this action the mortgagors conveyed the mortgaged premises to the defendant corporation. That being so, I think it to be well settled that the defendant who took and holds the premises subject to the prior mortgage is estopped from questioning the consideration or validity of it. (*Freeman* v. *Auld*, 44 N. Y. 50.) In New York it was repeatedly held that one who took title subject to a usurious mortgage, which by a statute of that State was absolutely void, was estopped from questioning its validity. (*Sanders* v. *Church*, 6 N. Y. 347; *Murray* v. *Judson*, 9 *id.* 73; *Huntley* v. *Harrison*, 24 *id.* 170; *Dix* v. *Van Wyck*, 2 Hill, 522.) And I think it equally clear that the defendant Corbin, one of the mortgagors, after conveying his entire interest in the mortgaged premises to the defendant corporation cannot in this action attack the validity of the mortgage on the ground that it was obtained from him through fraud. No personal judgment is sought against him for any deficiency there may be after applying the property to the debt. The pleadings show that he had no title or interest in the mortgaged premises to be affected by the decree. His being a stockholder in the defendant corporation would not in any conceivable case entitle him to set up a defense which the corporation could not. Nor do I think that he could have the matters set up in the cross-complaint which the Court refused him leave to file, litigated in this action. The relief which he demanded was a judgment against his co-defendant Handy for the sum of $300,000, and to have the plaintiff adjudged to be an involuntary trustee of the notes and mortgage executed by him, Corbin, and Handy for the benefit of him, Corbin.

In the language of Comstock, Ch. J., in *National Fire Insurance Company* v. *McKay et al.*, (21 N. Y. 191.): "I do not see that anything was in litigation between him and the plaintiff, or that any judgment could be rendered against him, except one for costs for interposing a groundless defense to the suit. According to the answer, no cause of action existed against him. The complaint claimed nothing against him personally, and stated no facts as the foundation of such a decree. The answer showed that he had no title or interest in the mortgaged premises to be affected by the decree." The plaintiff seeks to have the mortgage foreclosed, and alleges facts sufficient to entitle her to that relief. The only other party interested in the question is the defendant, who purchased the mortgaged premises subject to the mortgage. I am unable to discover how defendant Corbin, who, according to his answer, has no interest in the mortgaged premises, can thrust himself into a case in which

the sole question is, whether the plaintiff is entitled to a judgment which will affect nothing except the mortgaged premises. How is he going to litigate in this action, the question whether he has been defrauded by his co-defendant, Handy, and other persons who are not parties to the action, is, to me, incomprehensible. If *Chater* v. *S. F. Sugar Refinery* (19 Cal. 220), or *Shorb* v. *Beaudry* (56 *id.* 446), sustains the contention of the appellants, I must confess my inability to see it. I am unable to discover that any such question was involved or considered in either of those cases.

I think the judgment and order appealed from should be affirmed. SHARPSTEIN, J.

DEPARTMENT No. 1.

[Filed May 30, 1883.]

No. 7927.

DRISCOLL, RESPONDET, *v.* HOWARD, APPELLANT.

STREET ASSESSMENT—DECREE—LIEN—OWNER. A decree cannot be entered in an action to foreclose the lien of a street assessment, unless all the owners of the lot are before the Court.

Appeal from Superior Court, San Francisco.

C. H. Parker for respondent.
Jarboe & Harrison for appellant.

By the COURT:

The action was brought to enforce the alleged lien of a street assessment. The action was brought against Thomas B. Howard and Mary T. B. Howard as defendants. The complaint avers "that said defendants are the owners in fee of said described land, and in possession of and claiming to own the same and exercising acts of ownership over the same. That the legal title of said land appears by deeds recorded in the Recorder's office of said City and County to be in defendants." The action was *dismissed* by plaintiff as to defendant Mary T. B. Howard. Upon the default of the defendant Thomas B. Howard, judgment was rendered against him and for a sale of the premises. From such judgment the defendant Thomas B., appeals.

The original complaint was not amended. From the judgment-roll it appears that the land being owned in fee by Thomas B. and Mary T. B. Howard, a decree for the sale of

the premises was entered against the sole defendant Thomas B. Howard. But a decree cannot be entered in an action to foreclose the lien of a street assessment, unless all the owners of the lot are before the Court. (*People* v. *Doe*, 48 Cal. 560; *Hancock* v. *Bowman*, 49 Cal. 413; *Clark* v. *Porter*, 53 Cal. 409; *Diggins* v. *Reay*, 54 Cal. 525; *Harney* v. *Applegate*, 57 Cal. 205.)

Judgment reversed and cause remanded for further proceedings.

IN BANK.

[Filed September 28, 1883.]

No. 8406.

SWAMP LAND DISTRICT No. 121, APPELLANT, *v.* HAGGIN, RESPONDENT.

ASSESSMENT—SWAMP LAND DISTRICTS. The plaintiff, a corporation, was organized under the Act of March 28, 1868. *Held*, that the Act was not repealed by the provisions of the Code, and that the plaintiff must pursue the Act and not the Code in making and collecting assessments for the benefit of the district.

Appeal from Superior Court, Kern county.

Smith, Stetson & Houghton for appellant.
Louis T. Haggin for respondent.

ROSS, J., delivered the opinion of the Court:

For the reasons given in the opinion delivered when this case was last before this Court (10 *P. C. L. J.*, 604), the judgment of the Court below must be affirmed. It is true, as said by counsel for appellant, that the district in question in the case entitled *Reclamation District No. 3* v. *Kennedy*, referred to in the opinion then delivered, was formed under a law in force prior to May 28, 1868, and could have reorganized (but did not) under the provisions of the Political Code, while the present appellant was formed under the Act approved March 28, 1868, and was not permitted by the provisions of the Political Code to reorganize thereunder. But it is obvious that if it be true that the Act of 1868 was unrepealed by the provisions of the Political Code, the applicability of the Kennedy case to the one at bar it strengthened by the circumstance alluded to by counsel.

In Reclamation District No. 3 vs. Goldman, 9 Pac. C. L. J., p 746, it was distinctly decided that the act of 1868, in

relation to the reclamation of swamp and overflowed lands, was not repealed by the provisions of the Political Code. It is now suggested that that decision is in conflict with the case entitled Hagar vs. Board of Supervisors, 51 Cal. 474. There is an apparent but no real conflict between the two cases. In Hagar's case the question was as to the validity of an order made by the Board of Supervisors appointing Commissioners to levy an additonal assessment to pay for work which had already been done. After referring to sections 33 and 34 of the act of 1868, the learned Justice who delivered the opinion of the Court, erroneously said that the law as there written so remained up to the time of the adoption of the Political Code, and taking up the amendment to section 3,459 of that Code, enacted March 30, 1874, by which authority was given for the levy of an additional assessment to pay for work which had already been done as well as that which was to be done, sustained the validity of the Board of Supervsors. Attention does not seem to have been attracted to the fact that by an act approved March 28, 1872 (*Statutes* 1861-72, *p.* 668). Section 34 of the act of 1868, was so amended as to authorize an additional assessment to pay for work which had already been done as well as for that which was to be done. Indeed the amendment of March 28, 1872, to the act of 1868, and the amendment of March 30, 1874, to the Political Code are identical in substance and almost in form. The language, therefore, upon which the decision in Hagar's case was based was a part of the act of 1868, under which the district then before the Court was organized. The statement in the opinion in that case, to the effect that the provisions of the Political Code had superseded the act of 1868, was, therefore, not only unnecessary to the decision of the case, but was based on a misapprehension of fact. In Goldman's case the question was distinctly presented, whether or not the act of 1868 was repealed by the provisions of the Political Code, and it was held that it was not. Strength is given to the conclusion there reached by Section 3,478 of the Political Code which reads: "Districts formed under laws in force prior to May 28, 1868, may reorganize under the provisions of this chapter." to wit, Chapter 1, Title VIII of the Political Code. Express grant of authority to districts formed under laws in force *prior* to May 28, 1868, to reorganize under the provisions of the Political Code may fairly be taken as somewhat indicative of the intent, on the part of the Legislature to exclude districts formed under laws *subsequent* to the date named from that privilege. And when, in addition, provi-

sion was inserted in the Political Code, by which, as was held in the Goldman case, the Act of 1868 was construed in force, the question must be regarded as settled.

There is nothing in *People* v. *Haggin*, 57 Cal. 579, at all inconsistent with what is here said or with what was said in *Reclamation District* v. *Goldman*. In *People* v. *Haggin* the counsel for the plaintiff distinctly stated in their brief that the action was brought under and pursuant to the provisions of the Political Code to collect an assessment levied thereunder, and the Court, accepting the statement of counsel in that behalf as true, proceeded to point out the difference between the provisions of the Political Code and the Act of 1868 is so far as the point then under consideration was concerned, and rightly held that actions brought under the provisions of the Code to collect an assessment levied thereunder must be brought in the name of the real party in interest, to wit, the Reclamation District. There is, we repeat, no conflict between the cases alluded to by counsel except an apparent one between the Goldman and Haggin cases, which, however, is not real as has already been shown.

Judgment affirmed.

We concur: McKinstry, J., Sharpstein, J., McKee, J., Myrick, J., Thornton, J.

IN BANK.

[Filed September, 28, 1883.]

No. 8407.

SWAMP LAND DISTRICT No. 121, *v.* HAGGIN.

By the COURT:

On authority of *Swamp Land District No.* 121, v. *Haggin*, No. 8406, the judgment is affirmed.

IN BANK.

[Filed October 10, 1883.]

No. 10,847.

THE PEOPLE, APPELLANT, *v.* YOUNG, RESPONDENT.

COMMITMENT—HOMICIDE—COMPLAINT. The order of commitment, proper in form, being indorsed on the complaint, is held sufficient.

ID. The killing of the deceased by the defendant being admitted, whether or not the act was done in self-defense, or under circumstances of justification, was for the jury to determine.

Appeal from Superior Court, Yolo County.

Attorney-General for respondent.
C. P. & F. S. Sprague for appellants.

MYRICK, J., delivered the opinion of the Court:

1. The District Attorney filed an information accusing the defendant of the crime of murder. When the defendant was arraigned, and before pleading, he moved that the information be set aside, on the ground that he had not been committed as provided in Section 872, Penal Code, previous to the filing of the information. The motion was made on the following facts:

A complaint was laid before a Justice of the Peace December 25, 1882, accusing the defendant of the commission of the crime; an examination was had before the Justice on the 5th of January, 1883, and upon such examination being had the Justice made an endorsement upon the complaint, stating that it appeared to him that the offense had been committed, and that there was sufficient cause to believe the defendant Young guilty thereof, and ordering that he be held to answer the same, and that he be committed to the Sheriff of the county; which endorsement was signed by the Justice. This complaint, with the endorsements thereon, was filed in the Superior Court January 8th; the information was thereafter, on the same day, filed. At the examination before the Justice, the official short-hand reporter took down the evidence in short-hand, and subsequently wrote it out in long-hand, and the depositions so taken out and written out were endorsed, certified and filed in the Superior Court January 12th, four days after the filing of the information. The motion to set aside was made January 15th, and was denied by the Court.

We see no departure from any form or mode prescribed by the Penal Code in respect to the proceedings narrated above, which prejudiced the defendant, or tended to his prejudice, in respect to a substantial right. Section 1404, Pen. C.) Before the information was filed, an examination had been had and commitment made by a magistrate (Section 8, Art. I, Const.), the order of commitment, proper in form, being endorsed on the complaint. This was sufficient. (*People* v. *Smith*, 59 Cal. 365.)

2. The killing of the deceased by the defendant being admitted, whether or not the act was done in self-defense or under circumstances of justification, was for the jury to determine. We see no error in the records.

Judgment and order affirmed.

We concur: McKinstry, J., Thornton, J., Ross, J., Sharpstein, J., McKee, J.

DEPARTMENT No. 1.

[Filed May 17, 1883.]

No. 8666.

ARMSTRONG *v.* SUPERIOR COURT.

PRACTICE—CHANGE OF VENUE. The Court made an order on the application of defendant that the action be transferred to another County for further proceedings *upon payment by defendant of all costs*. Subsequently the Court annulled said order because the defendant did not, after a reasonable time, pay said costs. *Held*, not error.

Certiorari.

Petitioner prays for the annulment of an order of the Superior Court setting aside an order made in response to an application by defendant in an action, wherein one Estep is plaintiff and the petitioner is defendant, for a change of the place of trial from Lake to Sonoma county.

The motion was made on the ground that the action had been brought in the wrong county, and was supported by the defendant's affidavit that he was, and for many years had been, a resident of Sonoma. The plaintiff resisted the motion, asking that the cause be retained in Lake county, and filed and read an affidavit setting forth facts tending to prove that it would be for the convenience of witnesses to retain the cause. As the motion was made before answer the plaintiff was not authorized to resist it on the ground that it would be made convenient for witnesses to try the action in Lake. (*Cooke* v. *Pengergast*, January 9, 1882.)

January 29, 1883—the return day of the motion—The Court below ordered: "That the motion to change the place of trial be granted, upon the payment by defendant of all fees accrued in this Court to date."

A demurrer to the complaint had been filed by the defendant contemporaneously with his demand for a change of venue, and, on the 12th day of February, 1883, the plaintiff asked the Court to set down the demurrer for argument and proceed with the determination thereof, claiming that a reasonable time had elapsed since the making of the order respecting a change of the place of trial, and the defendant had not paid the costs as therein required.

Thereupon it was by the Court ordered:

"Whereas, in this cause, the Court, on the 29th day of January, 1883, made an order, on the application of the defendant, that the same be transferred for further proceedings to the Superior Court of the county of Sonoma, upon payment by defendant of all costs accrued and to accrue in

this Court, and whereas, at this date said defendant has not paid said costs, nor offered any excuse for his failure to do so; now, therefore, it is ordered by the Court that the order made on the 29th day of January, 1883, be annulled and set aside." And it was then and there further ordered "that the demurrer aforesaid be set for hearing on the 29th day of February, 1883."

It is insisted by the petitioner that the condition in the order of January 29th, as to the payment of costs, was and is *void*, being a condition which the Court had no right to require, and, as a consequence, that the order should be read as if no such condition had been inserted, and was and is an order granting the motion for a change of the place of trial; that the order granting the change necessarily included an adjudication as to the defendant's residence; that the power of the Court was exhausted in the premises when it found that the defendant resided in Sonoma and granted the motion, and that, immediately upon the entry of the order, the Superior Court of Lake *lost*, and the Superior Court of Sonoma *acquired* jurisdiction of the action.

The intent and meaning of a judicial order are to be derived from its language. Even if the Court had no power to insert in the order the condition as to costs, there is no strict analogy between the order and a deed—for example—which may take effect as a conveyance, although it contains a condition *void* because against public policy, or for another reason. An order that a motion be granted, upon the payment of certain costs, is an order denying the motion, unless the costs be paid. We are not authorized to exclude the condition, and thus make the order the reverse of, or distinctly different from, what it was evidently intended to be. The order of the 29th of January is not an order absolute, either granting or denying the motion for the change of the place of trial. It provides the motion shall be granted, if (within a reasonable time) the costs are paid by the defendant; that the motion shall be denied if a reasonable time shall elapse without the payment of the costs by the defendant. It is an order to take effect in the future as an order granting, or as an order denying the motion, as one of two events shall occur. In determining its meaning it is entirely immaterial whether the Court had or had not power to insert the condition, or whether the insertion of the condition was error. In any case the defendant did not get the order which he asked for unconditionally; he did not get it at all, nor did he entitle himself to an order final, based upon

the payment of the costs—if such further order was necessary—because he did not pay the costs.

If, in response to the defendant's motion, the Court had no jurisdiction to make an order other than an order unconditionally granting or denying the motion, petitioner is not entitled to have annulled the order setting aside the order of the 29th of January. The effect of the order of February 12th would be simply to disencumber the record of the Superior Court of an order it had no jurisdiction to make, and would leave the motion for a change of venue undisposed of. If the order of the 29th of January was one which the Superior Court had power to make, it was not and did not purportto be a final order, taking effect, in the then present, as an order granting or denying the motion, and we know of no reason why the Court did not have *power* to set it aside. Certainly, as the defendant did not pay the costs within a reasonable time, or offer to pay them, he cannot complain of the order setting aside the order of January 29th—whether his failure to pay did or did not of itself operate an order *denying* the motion for a change of the place of trial.

But we are of opinion that the order of the 29th of January was, in its nature, interlocutory, and contemplated—in case the defendant should fail to pay the costs—another and subsequent order, based upon a finding that a reasonable time had elapsed without the costs having been paid. We have assumed, as is claimed by petitioner, that the order of the 12th of February is to be treated as an independent order setting aside the previous order. It may be that the proceedings of the day last mentioned read together constitute only a declaration that a reasonable time had passed, and the defendant had not paid the costs, followed by an order (setting down the demurrer for argument) the legal effect of which was finally to deny the motion for a change of the place of trial. Upon this last matter we express no opinion. If the order setting the demurrer for argument, following upon an adjudication that a reasonable time had expired without payment of costs by defendant, was an order denying the defendant's motion for a change of venue, the defendant—petitioner—had an appeal from that order.

But treating the action of the Court on the 12th of February, which preceded the setting down of the demurrer, as an independent order setting aside the order of the 29th of January, the petitioner cannot have the order of the 12th of February annulled, because up to the last-named date, no final order had been made granting the motion for a change of the place of trial.

It is not necessary to decide whether the Superior Court would have power to set aside a final order changing the place of trial.

The petition and proceedings thereunder are dismissed.

Superior Court City and County of San Francisco.

DEPARTMENT No. 6.

WINTERBURN *v.* CHAMBERS.

TENANT-IN-COMMON—OUSTER—ADVERSE POSSESSION—NOTICE—STATUTE OF LIMITATIONS. On the 16th of September, 1855, Mrs. Maria Josefa Soto de Stokes died at Monterey intestate, leaving, as her separate estate, the tract of land in suit, and, as her heirs, her husband, Dr. James Stokes, and fourteen children. March 25, 1857, the Legislature passed an Act authorizing the executor or administrator of Mrs. Stokes to sell the real property of her estate subject to the approval of the Probate Court. In 1858 Dr. Stokes, professing to act as administrator of Mrs. Stokes, and in his own right, contracted to sell the land to Richard Walsh for its then full value, subject to the approval of the Probate Court. The Probate Court approved the sale, and Dr. Stokes, professing to act as administrator and in his own right, made to Walsh a deed of conveyance purporting to convey all the right, title and interest of the estate of his deceased wife and all his own right, title and interest in the land. Walsh immediately entered under his deed claiming in himself the whole title and put the deed of record, and the whole tract was enclosed, and thereafter, continuously for more than twenty years held, occupied and enjoyed by him and those claiming through him under a claim of absolute title, openly and notoriously, continuously, exclusively and adversely to all the world.

Held: that Dr. Stokes had no authority as administrator of the estate of Mrs. Stokes, and that under his deed Walsh took only the undivided and individual interest of Dr. Stokes in the land; and that he entered under his deed which purported to convey the entire estate, as owner of the whole and not *as* a tenant in common. And, such entry constituted an ouster of his cotenants.

(2.) That he and those claiming through him having held the actual, continuous, open, notorious, adverse and exclusive possession of the land for more than five years after the majority of the youngest child, had acquired title to the land by such adverse possession.

(3.) That when a stranger enters under a deed purporting to convey the whole title, though from some want of power in the grantor, it conveys in fact only an undivided interest, and thereafter holds and maintains actual and exclusive possession of the whole, such entry constitutes sufficient notice to put the co-tenants upon inquiry and is *actual* notice from him to them of an ouster and is sufficient to set the statute of limitations in motion, and they must take notice, and the statute will begin to run from the date of the entry.

Pringle & Tyler for plaintiff.
Mastick, Belcher & Mastick for defendants.

EDMONDS, J.

This is an action for the partition of the north half of the Rancho de Capay, situated on the west bank of the Sacramento river in the counties of Colusa and Tehama. The defendants, Lewis H. Mackintosh and Joseph L. and Charles R. Chambers, claim title to the whole premises by adverse possession. The facts are these:

On the 5th of January, 1844, Maria Josefa Soto petitioned the Governor of California, Manuel Micheltorena, for a grant of ten leagues of land on the west bank of the Sacramento river, extending northward from the river Capay ten leagues along the Sacramento, one league in width.

On the 16th of the same month she executed and delivered to Pierson B. Reading, for the nominal consideration of one dollar, her deed of grant, bargain and sale with covenant of warranty, for the north half of said ten leagues, but possession was never delivered or taken under this conveyance.

On the 18th day of December, 1844, said Maria Josefa and Dr. James Stokes intermarried, and on the 21st, three days after her marriage, the Governor of California made to said Maria Josefa a grant of a tract of land *two* leagues in width on the west bank of the Sacramento and extending northward along said river *five* leagues from the river Capay. Thus the tract granted in December does not include any part of the premises conveyed to Reading in January preceding. Nevertheless, pending proceedings for the confirmation of her claim in the District Court of the United States, Reading quit-claimed his interest in the ranch, such as it was, to *Stokes and wife*, for the consideration of $4,000, taking a mortgage back, which was afterwards paid and canceled of record.

On the 16th of September, 1855, Mrs. Stokes died at Monterey, leaving fourteen children—four, Nicolas, Guadalupe, Rafael and Luisa Can, by a former husband, and ten, Santiago, Emanuel, Domingo, Catherine, William, Josephine, Henry, Lucy, Mary and Francisca, by Dr. Stokes, who survived her.

The Legislature, in 1857, passed an Act entitled "an Act to authorize the executor or administrator of the estate of Josefa Soto de Stokes, deceased, to sell the real estate of said deceased at public or private sale," which was approved March 25, 1857. (Stat. 1857, p. 99.)

Under this Act Dr. Stokes, on the 16th of March, 1858, entered into a contract in writing with R. J. Walsh, whereby as administrator of the estate of Maria Josefa, his deceased

wife, he contracted to sell and convey to Walsh all the land involved in this action at $1.50 per acre, amounting to $14,376.43, which was the full value of the land at that time, subject to the approval of the Probate Court of Monterey county, which approval having been obtained, on the 21st of April 1858, a conveyance was executed and delivered to said Walsh by the said James Stokes as administrator of the estate of his deceased wife and also in his own right, which conveyance, after reciting that the said James Stokes as administrator as aforesaid and in his own right, had sold to said Walsh "*all the right, title and interest of said intestate, and all his own right, title and interest* in and to the tract of land" in controversy, purports to convey to said Walsh "*all their and each of their right, title and interest*" in and to said lands. Of the purchase money $6,600 was paid at the time of the conveyance, and the balance, which was secured by mortgage on the same premises, was paid within about two years with interest.

Walsh entered under this conveyance in the fall of 1858, and enclosed that portion of the tract afterwards occupied by him, and now claimed by Joseph L. and Charles R. Chambers, with a good substantial fence, and from that date continuously occupied, cultivated and pastured the same, claiming the title to the entirety under said conveyance, which he placed on record, kept the same enclosed and paid the taxes until his death in 1866.

Immediately after his purchase he sold, and by his contract in writing, agreed to convey to J. W. McIntosh the entirety of the northern portion of the tract, for a price which is conceded to have been the full value of the land. McIntosh immediately entered under his contract with Walsh, claiming the entirety, and enclosed the part purchased by him with a good substantial fence, put houses and other improvements thereon, resided thereon, and cultivated and pastured the same and paid the taxes. On the 23d of October, 1867, having paid the full amount of the purchase price under his contract, he received a conveyance of the entirety from the administrators with the will annexed of R. J. Walsh, and on the 23d of September, 1868, conveyed the entirety to his brother, the defendant Lewis H. McIntosh, who, in like manner paid the full value of the land at that time, and immediately entered under his deed, and has ever since resided thereon and cultivated and pastured the entire tract covered by his conveyance, kept it enclosed with a good and substantial fence, paid the taxes, and held and maintained exclusive and adverse possession, claiming the entirety

under his conveyance, which he placed immediately on record.

Walsh died in 1866, leaving a will which was admitted to probate in Colusa county, and the defendants, Joseph L. and Charles R. Chambers, claim under this will and the decree of distribution of the Probate Court, made in the matter of Walsh's estate March 4, 1872, distributing and setting over to them the lands now held by them and involved in this action, which decree was recorded in the office of the Recorder of Colusa county March 4, 1872. In the meantime, the administrators, with the will annexed of R. J. Walsh, who were E. B. Mastick and Nanny Walsh, the widow of deceased, had continued to occupy, cultivate and pasture the Walsh tract, in the same manner as Walsh had done before his decease, and on the 4th of March, 1872, the distributees, J. L. and Charles R. Chambers, entered under the decree of distribution, and have ever since by themselves and their tenants held and maintained actual possession of this tract, claiming to own the same in their own right and to the exclusion of every other right under said decree of distribution, and paying the taxes thereon.

Thus all the lands involved in this action have been continuously held and claimed adversely to the heirs of Mrs. Stokes and the whole world ever since the early part of 1859, under an open and notorious claim of title to the entirety under a recorded conveyance from Dr. Stokes as administrator and in his own right, purporting to convey as well the interest of Dr. Stokes as all the interest of his deceased wife in the premises at the time of her death, and mesne conveyances.

The United States issued its patent to Maria Josefa Soto de Stokes August 18, 1859, after her decease.

It may be assumed that the grant vested in Mrs. Stokes a separate estate. (*Scott* v. *Ward*, 13 Cal. 471.) I lay the deed to Reading out of the case; for giving it all the force claimed for it by counsel for the defendants, the premises conveyed by it are not included within the grant, but fall just outside, and north of it. And there are no words of reference in the deed, from which it can be inferred from the deed alone that it was intended to convey any portion of the tract covered by the grant.

At the decease of Mrs. Stokes, therefore, the lands in question descended, one-third to her husband, and one-twenty-first to each of the children. Santiago died April 25, 1862, intestate and unmarried; Dr. Stokes died September 28, 1864. Francisca died in 1865, unmarried and a minor,

thus making the shares of the surviving children each thirteen-two hundred and fifty-seconds. The interests, therefore, of the several parties, as tenants in common, are as they are claimed to be on the part of the plaintiffs, unless the rights of the tenants out of possession are barred by the statute of limitations. The youngest of the children attained majority more than ten years before the commencement of the action.

2. It is virtually conceded that the administrator's sale to Walsh was void, and that the conveyance of April 21, 1858, purporting to be a conveyance of all the interest of Mrs. Stokes at the time of her decease, as well as the interest of Dr. Stokes, individually, operated to pass merely the undivided interest of Dr. Stokes in the lands in controversy, and constituted Walsh a tenant in-common with the children of Mrs. Stokes. And the question to be determined is, has there been such an open, notorious and adverse possession of these lands by Walsh, and those claiming under him, to the exclusion of the co-tenants, as amounts to an ouster, and bars the rights of the latter under the statute of Limitations?

It is well established that one tenant-in-common may disseize or oust the others, without actually "turning them out by the heels," but there is an apparent confusion of authority as to what acts, short of actual force, will amount to an ouster.

It is apprehended, however, that the confusion is more apparent than real, and consists less in the principles of law involved, than in the application of these principles to the facts of each particular case.

"Two kinds of disseizin are mentioned in the English law books. The one was a disseizin in fact, which actually changed and divested the seizin of the original owner of the freehold, and deprived him of all right in relation thereto, except the mere right of entry and of property; and which, under certain circumstances, was still further reduced to a mere right of action, the right of entry being lost.

"By this species of disseizin the wrong-doer acquired a fee simple, and the actual seizin of the property, together with nearly all the rights of the real owner; and all estates depending on the original seizin were divested or displaced. The other kind of disseizin was called disseizin by election, because the owner might elect to consider himself disseized for the sake of the remedy by action of *novel disseizin*, but if he did not elect to consider himself disseized, the freehold was not divested, but still continued in him. * * *

"Disseizin *in fact* and disseizin *by election* have been so frequently confounded that in examing the *dicta* of Judges, it is sometimes difficult to understand to which species of disseizin they allude, without referring particularly to the facts of the case which they had under consideration, at the time such *dicta* were delivered. But by a careful examination of the authorities it will be found that there could be no disseizin *in fact*, except by the wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some other act which was tantamount, such as a common law conveyance with livery of seizin, by a person actually seized of an estate of freehold in the premises; or some one lawfully in possession representing the freeholder; or by a common recovery, in which there was a judgment for the freehold, and an actual delivery of seizin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record." (Per Walworth, Chancellor, in *Varick* v. *Jackson*, 2 Wend. 201-203.)

It was very early settled that a feoffment by one of several co-parceners who was alone in possession, made to a stranger for the whole premises, was a disseizin and ouster of the other co-parceners. (Townsend and Pastor's case, 4 Leon. 52; *Doe* v. *Taylor*, 5 B. and Ad. 575; *Gerry* v. *Holford*, Cro. Eliz. 615; Co. Litt. 374, a.) This effect was given by the common law to a feoffment with livery of seizin, because of the notoriety of the act of investiture by livery of seizin. Immediately upon the feoffment, the estate became the property of the feoffee as between him and the feoffor, and every other person except the rightful owner, and as to him there was a disseizin, and hence a long and uninterrupted possession of a certain duration made the title good as against him; and to prevent this he must have restored his own seizin. (*Foulke* v. *Bond*, 41 N. J. Law. 540.) And in several of the States, notably in New Jersey and Massachussetts, a similar effect is given by statute to a conveyance by deed of bargain and sale, or with covenants, duly acknowledged and recorded. (*Foulke* v. *Bond*, *supra*; *Higbee* v. *Rice*, 5 Mass. 344.) By the New Jersey statute "the grantee, under a conveyance by deed of bargain and sale, is deemed, taken and esteemed to be in as full and ample possession to all intents, construction and purposes as if he was possessed thereof by solemn livery of seizin and possession; and the policy of the recording acts substitutes the constructive notice arising from the publicity of the record in the place of the notoriety of investiture by livery of seizin at common law." (*Foulke* v.

Bond, supra.) And the effect of the Massachusetts statute is the same. (*Higbee* v. *Rice, supra.*)

On the other hand, it would seem to be clear upon principle that no such effect can be given to a mere conveyance in those States where a conveyance, in whatever form, is held to pass only such interest in the premises as the grantor could lawfully convey. And hence, it is urged, and with some show of reason, by the learned counsel for the plaintiffs, that except in those States where a conveyance by deed, duly acknowledged and recorded, is given the force and effect of a feoffment with livery of seizin, a conveyance of the entirety by a tenant-in-common, cannot operate as an ouster of his co-tenants. Nevertheless, the authorities are quite uniform to the effect that actual adverse possession under such a conveyance *may* amount to an ouster. We are led, therefore, to look for a justification of such a uniform course of decision, to some other principle than such as may be involved in the mere force and effect of the conveyance itself. And this principle is found in the fact of actual possession by the grantee, accompanied with such acts of ownership and exclusive claim, as may, under the circumstances of each particular case, be held to constitute an ouster, and set the statute in operation.

And here it is proper to notice a distinction which is often overlooked, between the acquisition of an adverse title by a tenant-in-common already in possession *as such*, and the entry and possession of a *stranger* under a conveyance in form of the entirety, who has the relation of tenant-in-common forced upon him without his knowledge or consent. The distinction has relation to the question of notice to the co-tenants. Thus, I understand it to be the rule, at least in this State, that a tenant-in-common cannot be ousted by his co-tenant by a silent possession, however exclusive, of whose adverse character he has no notice. (*Colman* v. *Clements*, 23 Cal. 247, 248; *Seaton* v. *Son*, 32 *id.* 484; *Miller* v. *Myers*, 46 *id.* 539; *Carpentier* v. *Mendenhall*, 28 *id.* 484; *Carpentier* v. *Mitchell*, 29 *id.* 330; *Packard* v. *Johnson*, 57 *id.* 180.) And in this respect I understand the rule here to be substantially in consonance with the almost uniform current of decisions in other States. But what amounts to *notice* of an adverse holding, as between tenants-in-common, so as to effect an ouster, and set the statute of limitations in motion, must still be considered to a great extent an open question in this State. The doctrine seems to be clearly recognized, here as elsewhere, that to constitute an ouster, an actual "turning out by the heels" is not necessary; nor the

sending of express notice to the co-tenant; but that any act or series of acts "of such a nature as the law will presume to be noticed by persons of ordinary diligence in attending to their own interests, and of such unequivocal character as not to be easily misunderstood," will be sufficient.

In discussing this question Mr. Justice Story uses the following language: "Now, such a notorious ouster, or adverse possession, may be by any act *in pais* of which the other tenants have due notice, or by the assertion, in any proceeding at law, of a several and distinct claim or title to an entirety of the whole land, or, as in the present case, of a several and distinct title to the entirety of the whole of the tenants' purparty under a partition, which in contemplation of law is known to the other tenants." (*Clymer's Lessee* v. *Dawkins*, 3 How. 689.) And applying this doctrine to the facts of that case, the learned Justice says (page 688): "In our judgment, it is wholly unnecessary to decide whether these proceedings (in partition) were absolutely void or not; for assuming them to have been defective or invalid, still, as they were matter of public notoriety, of which Clymer was bound at his peril to take notice, and as Lynch and Blanton under these proceedings claimed an exclusive title to the land assigned to them, adversely to Clymer, *if the defendants entered under that exclusive title*, the possession must be deemed adverse, in point of law, to that of Clymer."

Ordinarly, it can hardly be maintained that one is bound to take notice of a proceeding at law which is absolutely void, and it sufficiently appears, from other portions of the opinion in that case, which will be noticed hereafter, that it was not intended to be held that such proceeding, *of itself*, and independent of actual possession *openly and notoriously taken and held under it*, by Lynch and Blanton and their grantees, was a fact of which Clymer, residing in another State could have been "bound at his peril to take notice." Be this as it may, the defendants were strangers, who claimed to have entered and held adversely to Clymer and the whole world under conveyances of the entirety from Lynch and Blanton and others, and the ruling of the Court in this regard will be noticed hereafter as an authority that such entry and possession was of itself sufficient for the jury to infer an ouster, without further or other notice to the non-resident tenant-in-common than such as might be inferred from the open and notorious character of the possession itself. For the actual entry and possession of a *stranger* is a fact *in pais*, of which all are bound to take notice. The fact

that he is a *stranger* challenges immediate inquiry, and all persons claiming an interest in the same lands are bound to take notice of his entry, and ascertain whether the new comer entered in common with them or adversely. The reason is obvious and may be illustrated by the analogy of trusts. Thus, if I see my trustee in possession, it is a fact consistent with our recognized relations, and calls for no inquiry on my part into his intentions or the facts surrounding and characterizing his possession. I am entitled to presume that his possession is consistent with the trust, until notice that he has repudiated the trust is brought home to me in some form. But this rule so manifestly founded in the plainest principles of reason and equity, it is now well settled, does not apply to a trustee by construction or implication of law, upon whom the relation of trustee is forced against his will. (Perry on trusts § 865; Hill on Trustees, star page 264–265).

The statute of limitations will run in favor of such a person from the date of his entry, (1) because his entry is adverse from the beginning, and (2) being a stranger to the trust prior to his entry, there is no presumption that his possession is fiduciary, and every one is put upon inquiry.

This doctrine, so well established in regard to trusts, applies with equal reason to the relation of tenants-in-common; and the same presumptions which ordinarily arise from the possession of a tenant-in-common do not attach to the entry and possession of a stranger, who by reason of some defect in a conveyance purporting on its face to convey the entirety, has the relation of a tenant-in-common thrust upon him against his will. His relation to the other tenants is in no sense fiduciary, and the facts are wanting which can entitle them to presume, without inquiry, that his possession is amicable. Had he entered without color of title and held adversely, five years would have ripened his possession into a perfect title. Had his deed been effectual according to its terms, his title would have been perfect to the entirety. And his entry is not less hostile because of a defect in his title of which he was not aware, nor is he the less a stranger whose entry and possession call for inquiry.

Walsh purchased and paid for the *entirety*, and accepted and paid for, in good faith, a conveyance of the entirety. He was a stranger to the title and to the heirs prior to his purchase. He entered under his conveyance, claiming and openly asserting his ownership of the entirety, and immediately sold to J. W. McIntosh the north half of his purchase. He placed his own conveyance upon record, and en-

closed with a good substantial fence the remaining or unsold portion, and cultivated and pastured it. He paid the taxes. His possession was adverse from the beginning, and openly and notoriously asserted. There could be no stronger assertion of his claim to the entirety than his sale of the entirety of the north half of his purchase to McIntosh. There could be no presumption that his entry or possession was as a tenant-in-common with the heirs, for he was a *stranger*, who, prior to his entry, had had no relations with them whatever. If they inquired, as they were bound to do, by what right he entered and exercised these acts of ownership, they must have learned the adverse character of his claim and possession. In the absence of proof to the contrary, they will be presumed to have made inquiry and learned the facts characterizing his possession and that of his grantees as hostile and adverse. In this manner they are chargeable with notice of the administrator's sale and conveyance, which was confirmed by the Probate Court and placed upon record; with notice of the conveyance by Walsh's administrators with the will annexed to J. W. McIntosh and his conveyance to his brother, both of which were on record; and with notice of the decree of distribution under which J. L. and Charles R. Chambers claim.

The conveyance by Dr. Stokes, as administrator, and in his own right, would have passed the interests of the heirs. if it had taken effect according to the intention of the parties and its own terms.

It failed to pass their interests for want of authority on the part of the administrator to execute the conveyance. But the entry of Walsh under this conveyance is none the less decisive of his intention to claim the entirety to the exclusion of the heirs. Had he taken a conveyance of the entirety from Dr. Stokes in his own right, and not as administrator, the authorities are abundant that his entry thereunder would have been decisive of his intention to claim the entirety in accordance with the terms of his conveyance. Still more strongly is this intention manifested by purchasing and taking a conveyance from the administrator *as such*, who, if any one, could convey the interests of the minor heirs, and whose conveyance had the sanction of the Legislature and the Probate Court. His entry and possession were openly and notoriously adverse to the heirs, and if they were put upon inquiry by the fact of his being a stranger with whom, prior to his entry, they had had no relations, then there is nothing wanting to constitute his entry and adverse possession under this conveyance, such an ouster of his co-tenants as to set

the statute of limitations running in his favor, against all who were not under disability.

What has been said of the possession of Walsh, applies with at least equal force to the purchasers from Walsh, whose entry and possession as strangers, and as purchasers from a stranger, each of the entirety to his several tract, was notice of itself to the heirs sufficient to put them upon inquiry.

The authorities in support of this position are overwhelming, and if there are any opposing authorities, my attention has not been called to them.

In the case of *Culver* v. *Rhodes* (87 N. Y. 348), the defendant had been in possession as a tenant-in-common for years. She then took a conveyance from her mother, who was also in possession as life-tenant, and not in hostility to the title in remainder, and did nothing more. "*No change in the possession or occupation took place.* No notice of a hostile claim, either by word or act, was given to the co-tenants after the conveyance." (*Id.* 352–353.)

In *Roberts* v. *Morgan* (30 Vt. 319) there was an express recognition by the tenant in possession of the right of his co-tenant, and an arbitration as to the extent of their respective titles. (See p. 324.)

In *Leach* v. *Beattie* (33 Vt. 195) one tenant-in-common of *wild and unoccupied lands* gave a mortgage on the same which was foreclosed. There was no actual possession under the mortgage, either before or after the foreclosure, except a little lumbering done during one season, and cutting an occasional stick of timber. The Court very properly held that the acts done on the land were insufficient to constitute a continuous possession in fact, and that the giving of the mortgage did not of itself operate as an ouster.

In *Holley* v. *Hawley* (39 Vt. 525) one tenant-in-common conveyed his "title and interest" to his son, who entered, but not, as he claimed, under this deed. It was a question of fact whether his possession was to be referred to this deed, or to a subsequent deed from a third party, and the Court held there was sufficient evidence that he held under the deed from his father. (*Id.* 530, 531.)

Carpentier v. *Mendenhall* (28 Cal. 484) turned upon the sufficiency of a special verdict, and the Court held that a "demand and refusal," though evidence of an ouster, and in the absence of all explanation sufficient to justify the jury to infer an ouster, is not its legal equivalent, because it is susceptible of explanation. (*Ibid,* 487.)

In *Seaton* v. *Son* (32 Cal. 481) what is said about adverse possession has been the subject of unfavorable criticism.

Mr. Freeman says, it states a proposition of law which is "unsustained and unsustainable, (Co-tenancy and Partition, § 225). And yet, all the Court holds in that case is that *mere belief* of a grantee that his deed conveys the entire title, and *exclusive actual possession* under the deed, are insufficient to constitute an ouster as between tenants-in-common. This is all, and if there is anything in this statement of the rule at variance with the authorities, I am unable to perceive it. All the authorities require an *exclusive claim* to the entirety. "*Belief*" is not "*claim*," nor an essential element of claim; for an exclusive claim may be set up by one who is aware of a defect in his title, as, for instance, by an heir against his co-heirs, and such claim and possession though founded in wrong, if sufficiently hostile, open and notorious, will ripen into a perfect title by lapse of time. Hence while it may be true that the question of adverse possession or actual ouster was not strictly involved, what the Court say on the subject is substantially in consonance with the uniform current of authority. Perhaps an infelicitious use of the phrase "*actual ouster*" may have led to a misunderstanding of the point ruled, but that the Court did not intend by this term a *forcible* turning out or exclusion, is evident from the cases which have preceded and followed it in the same Court. Thus in *Carpentier* v. *Mendenhall, supra*, and *Carpentier* v. *Mitchell* (29 Cal. 330) a "demand and refusal," and in *Miller* v. *Meyers* (46 Cal. 539) and *Packard* v. *Johnson* (57 Cal. 183) "notice either actual or constructive, that the possession of his co-tenant has become hostile," are distinctly recognized as sufficient. But in none of the cases in this State, has there been an adjudication as to the sufficiency of the proof to sustain a finding of "actual ouster," apart from a "demand and refusal." In *Packard* v. *Johnson* (*supra*) it is said: "The purchase of an outstanding claim of title by Sanor" (a tenant-in-common, who, prior to his purchase, had always recognized his co-tenant) "and his *quit-claim* to defendant (if plaintiff had notice of the purchase and conveyances, which does not appear), the greater or less notoriety of defendant's exclusive claim, his erection of buildings and other improvements, the pernancy of the entire profits, the payment of the taxes, and the like, are evidentiary circumstances, of more or less weight, tending to prove ouster and adverse possession—no more." But the Court here was dealing with the findings, which failed to find the fact of "ouster," and they say, as they said of the special verdict in *Carpentier* v. *Mendenhall* that "while the facts found *tended to prove* adverse possession for the

statutory time, yet the facts found did not necessarily constitute adverse possession." Apart, therefore, from a "demand and refusal," what acts of a tenant in possession are sufficient evidence of an ouster, and what is sufficient notice to a co-tenant of a hostile possession, are open questions in this State.

In *Warfield* v. *Lindell* (30 Mo. 286) it is said: "The facts which have usually gone to make out a case of adverse possession, have been such as a refusal to the co-tenant to permit his participation in the profits or his entry; a denial of his title, *claiming under a defective deed for the entirety*, purchasing the co-tenant's title at a Sheriff's sale and an exclusive claim under it, *or a conveyance of the whole by deed and an entry by the grantee under the deed* (2 Cruise Dig. Tit. W. S. 14, note 3); and we may add, following the case of *Law* v. *Patterson*, putting up improvements without consultation with the co-tenant and under his observation and taking the entire profits without objection from him."

Entry and actual possession under a deed of the entirety are among the commonest cases of ouster to be found in the books. See in particular, *Prescott* v. *Nevers* (4 Mason, 330), *Clymer's Lessee* v. *Dawkins* (3 How. 674), *Bradstreet* v. *Huntington* (5 Peters, 402), *Thomas* v. *Pickering* (13 Me. 337, 353), *Parker* v. *Proprietors of Locks and Canals* (3 Met. 91), *Culler* v. *Motzer* (13 Serg. & R. 356), *Lodge* v. *Patterson* (3 Watts. 74), *Dikeman* v. *Parrish* (6 Penn. St. 210, 225), *Horne* v. *Howell* (46 Ga. 9), *Abercrombie* v. *Baldwin* (15 Ala. 363, 370), *Alexander* v. *Kennedy* (19 Tex. 496), *Ashley* v. *Rector* (20 Ark. 359, 377), *Weisinger* v. *Murphy* (2 Head 674).

In *Prescott* v. *Nevers*, Mr. Justice Story says: "I take the principle of law to be clear that where a person enters into land under a claim of title thereto by a *recorded* deed, his entry and possession are referred to such title."

In *Farrar* v. *Fessenden* (29 N. H. 269) the Court say: "It is not necessary that an adverse possession, to be available under the Statute of Limitations, should commence or be continued under effectual deeds. If the entry be under color of title the possession will be adverse, however groundless the supposed title prove to be." And *possession* under a recorded deed was further held to be constructive notice to all the world that the grantee is in, claiming under and according to his deed. (*Ibid.*) Not that the *record* of the deed is, of itself, constructive notice to any but subsequent purchasers, etc., from the same grantor; but *actual possession* under such a deed *is* notice which calls for inquiry, and charges all persons with constructive notice of facts which they might have learned by such inquiry.

In *Dikeman* v. *Parrish*, (6 Penn. St. 225,) it is said: "Of the facts that have been recognized as indicative of hostile intent, none are perhaps more decisive than the exhibition of a paper title independent of that residing in the original owner, by color of which the party justifies his entry. Thus it has been held that if one tenant-in-common sell the whole land, and possession of the whole be taken by the purchaser, he will be considered as entering adversely to the co-tenant; because he entered under an adverse title, and not *as co-tenant*."

In *Lodge* v. *Patterson*, (3 Watts. 74,) one of two tenants in common (brothers) died. The survivor put up his deceased brother's interest at public vendue, and bid it in himself. The Court say of this transaction: "The character of adverse possession is given, not by proving notice to parties interested, but by the nature of the acts done by the party. There must be a hostile intent, and that intent must be manifested by outward acts of an unequivocal kind. To constitute a disseizin, it was never held to be requisite that notice should be sent to the disseizee, or that it must be proved that he had knowledge of the entry and ouster committed on his land. The open act of entry, with the declared intent to disseize, constitute the disseizin. No act unexplained could be a stronger declaration of the intent of the party than his purchasing the whole right of his deceased brother in the lands."

Again, in *Foulke* v. *Bond*, 41 N. J. Law, 519, at page 540, the Court say: "The conveyance by one tenant of the estate in entirety is decisive of his purpose to appropriate the entire estate to his own use, especially if his deed contain full covenants of seizin and warranty. The entry of the grantee under such a conveyance is equally evincive of his intention to claim the whole to the exclusion of the other co-tenants, and if the deed be duly recorded, the transaction acquires that notoriety which is equivalent to livery of seizin." What is here quoted has reference to the effect of entry and actual possession by a stranger under a recorded conveyance of the entirety from a tenant-in-common, as indicative of a hostile intent, and as constructive notice to the whole world of his claim in accordance with the terms of his conveyance, and that the Court in this passage is asserting a general principle rather than declaring the effect of the New Jersey statute, is apparent from the citation of authorities from other States.

Citations to the same effect might be multiplied indefinitely, but I will only add one more. In *Clymer's Lessee* v. *Dawkins* (3 How. 689), the Judge had instructed the jury:

"That if any of the defendants *entered into possession* of the lands respectively claimed by them, and held the same for more than twenty years before the commencement of the suit, by a purchase and claim thereof *in entirety and severalty*, and not for an undivided part thereof in co-tenancy with Clymer or his devisees, but *adversely* to them, then such defendant was entitled to a verdict in his favor, whether he held by purchase from Lynch or Blanton" (co-tenants with Clymer), "or any other person who had ever afterwards up to the commencement of the suit, continued thus to hold the possession."

Of this charge the Supreme Court say: "We see no objection to this instruction, which ought to prevail in favor of the plaintiff; on the contrary, we deem it entirely correct and in consonance to the principles of law upon this subject." The facts were, that Clymer, Lynch and Blanton were tenants-in-common of a large tract of land in Kentucky; that Lynch and Blanton, being residents of Kentucky, procured a partition by proceedings in the County Court, which were void, and of which Clymer, who resided out of the State, had no actual notice; that Lynch and Blanton had sold and conveyed, according to this partition, to the defendants, who had entered under their deeds; and the case is therefore an authority directly in point upon the question under consideration, and is especially valuable as affording a judicial explanation of what is meant by Judge Story when he speaks in the same case "of some notorious act of ouster or adverse possession by the party so entering into possession," which "*is brought home to the knowledge or notice of the others.*" It is evident that the entry of a stranger under a deed in severalty from a tenant-in-common, was considered by this distinguished jurist, and by the Court for which he was speaking, to be such an overt and notorious act, "brought home to the knowledge or notice" of the whole world, as would constitute an ouster of a co-tenant, and set the statute of limitations in motion.

My conclusion, therefore, from the authorities, is, that Walsh and his grantees, having never prior to entering on the premises had any relations whatever with the heirs, were not bound to send them word that they claimed adversely; but that the heirs, seeing strangers enter, reside upon, fence, and improve, cultivate and pasture the entire tract, and continuing to exercise all the usual acts of exclusive ownership over the same for more than twenty years, were bound to inquire what it meant, and must be presumed to have had notice of the adverse character of such possession, and to have acquiesced therein.

3. This view is strengthened rather than otherwise by the deed of Stokes and Winterburn to R. J. Walsh, June 11th, 1863, by which Walsh acquired also the interests of Luisa and Nicholas Cano for the nominal consideration of one dollar. The learned counsel for the plaintiffs has referred to this deed as a recognition by Walsh of the common title, if not an estoppel, in favor of the tenants-in-common, whose interests were not purchased. But I think the authorities are clear that it is neither. (*Cannon* v. *Stockmon*, 36 Cal. 539; *Northrup* v. *Wright*, 7 Hill, 490.) On the contrary, the nominal consideration of one dollar expressed in this deed is at least presumptive evidence that some of the heirs attached very little importance to their interest in the ranch, even at that early date, before the statute had run upon their rights, and goes far to account for the acquiescence of the other heirs. We have seen that Dr. Stokes and wife deemed it expedient in 1855 to pay $4,000 for a release and quit-claim from Reading, whose only claim was founded on the deed of January 16th, 1844, and if there had been any value attached in 1863 to the interests of the heirs in this ranch, we cannot suppose that the quit-claim of Stokes and Winterburn could have been procured for the consideration of one dallar.

Let findings and decree be drawn in accordance with this opinion, and in favor of defendants, L. H. McIntosh and J. L. and Chas. R. Chambers.

Abstract of a Recent Decision.

ULTRA VIRES—LIABILITY OF CORPORATION FOR MONEY HAD AND RECEIVED CONTRARY TO ITS BY-LAWS. A corporation sued for money had and received will not be heard to answer that the following by-law was in force at the time of the transaction; "No debt shall be contracted for or in the name of the company, except by the order of the board of directors, and then not in excess of the funds actually in the treasury," and that the board of directors did not authorize the creation of the liability, and there were at the time no funds in the treasury. It is not material whether or not, by the law of the home of the corporation, such by-law has the force of a statute. A corporation that has received money or property from another and appropriated it, cannot be heard to refuse to account for it, on the ground that it had no power under the charter to take it. *Manville* v. *Belden Mining Co.*, U. S. C. C., D. Colorado, June 23, 1883; 3 Col. L. Rep. 558.

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Current Topics.

SUCCESSION AMONG ILLEGITIMATES.

In December, 1882, Department One (J. J. McKinstry, Ross, and McKee) held that the legitimate son of a deceased illegitimate mother could not inherit the estate of his mother's sister, who was also illegitimate and who died intestate without lawful issue, the mother of the two illegitimate daughters also being dead.

Section 1387 C. C. provides that "an illegitimate child is always the heir of his mother, but only directly, and not by right of representation. Section 1388 C. C. provides that the estate of an illegitimate child, dying intestate, goes to the mother or to her heirs at law.

The Court were of the opinion that this last phrase of Section 1387 refers solely to legitimate "*heirs at law*", and not to illegitimates. (Estate of Magee, 10 Pac. C. L. J. 745.)

The Court *in bank* (JJ. Myrick, Ross, McKee, Thornton and Sharpstein) now reverse this ruling, upon the ground that the legitimate son of an illegitimate mother (already deceased) must inherit what his mother would inherit, and she is by statute (Section 1387 C. C.) declared to be in all cases an heir of her mother, inheriting in the same manner as if born in lawful wedlock. As under Section 1388 C. C., the estate of an illegitimate daughter, dying intestate, without lawful issue, goes to her mother, or, in case of her decease, to her heirs at law, therefore her estate would go, in this case, to her illegitimate sister, or, in case of her decease, to her heirs at law, viz: her legitimate son. (Estate of Magee, 12 Pac. C. L. J. 144.)

Supreme Court of California.

IN BANK.

[Filed September 27, 1883.]

No. 10,838.

THE PEOPLE, RESPONDENT,

v.

AH COON AND AH LEE, APPELLANTS.

CRIMINAL LAW—MURDER—EVIDENCE—INSTRUCTIONS. Evidence was given that the defendant stabbed the deceased; a physician was called, who testified that he was not able to say whether the wounds were mortal or not, as he did not make a thorough examination, but that one of the wounds was dangerous, and there was a probability of its being fatal. *Held*, this evidence in connection with the fact that within four days the man died, was sufficient to justify the jury in arriving at the conclusion that he died of the wounds.

ID. That the instructions given, in connection with others, held not erroneous or prejudicial.

Appeal from Superior Court, Butte County.

Attorney General for respondent.

John C. Gray, L. I. Mowry, Rearden & Freer for appellants.

MYRICK, J., delivered the opinion of the Court:

The information in this case accused the defendants of the crime of murder. The jury returned a verdict of guilty of murder in the first degree. On this appeal, two points are presented, viz:

1. That there was not sufficient evidence that the deceased died of the wounds inflicted, to justify the verdict. Evidence was given that the defendant stabbed the deceased; a physician was called, who testified that he was not able to say whether the wounds were mortal or not, as he did not make a thorough examination, but that one of the wounds was dangerous, and there was a probability of its being fatal. We think this evidence, in connection with the fact that within four days the man died, was sufficient to justify the jury in arriving at the conclusion that he died of the wounds.

2. The transcript recites that after argument by counsel, the Court "fully instructed the jury as to all the material points of law in the case, and as to what verdicts they could find," they retired; they returned into Court, and the following occurred:

Juror—"There are some of the jurors who are not thoroughly satisfied as to the charge of the Court in regard to their position in bringing in a verdict, and they want further instructions."

The Court—"You can bring in a verdict of murder of the first or murder of the second degree—"

Foreman (interrupting)—"That was the instruction we wanted."

The Court—"You can bring in either."

Foreman—"That is all we wished."

The Court added—"If, from the evidence in the case, you find, and you are entirely satisfied, beyond a reasonable doubt, that they are the persons who killed, or aided and assisted in the killing of the deceased, at the time and in the manner charged in the information, and that they lay in wait to accomplish such killing, then you should find the defendants guilty of murder of the first degree, unless there are circumstances appearing in the evidence to reduce it below that degree."

It is contended that these instructions in effect instructed the jury to convict the defendants of murder, leaving to the discretion of the jurymen only the question of degree. After the Court had "fully instructed the jury as to all the material points of law in the case, and as to what verdict they could find," we see no ground for this contention to rest upon.

Judgment and order affirmed.

We concur: Thornton, J., Ross, J., McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed October 23, 1883.]

No. 8239.

COUNTY OF MERCED *v.* TURNER ET AL.

BOND—DELIVERY—ANSWER. As the execution of the bond sued on is not denied in the answer, the question as to delivery is not before the Court.

By the COURT:

We are of opinion that inasmuch as the execution of the bond sued on is not denied in the answer, the question as to delivery is not before us in this cause.

We find no error in the record and the order is affirmed.

DEPARTMENT No. 2.

[Filed October 9, 1883.]

No. 9222.

SNOW v. HOLMES.

APPEAL—MORTGAGE—BOND. A $300 bond on appeal stays the execution a judgment foreclosing a mortgage of personal property.

SUPERSEDEAS.

By the COURT:

This is an application for a writ of *supersedeas*, staying the execution of the judgment pending the appeal, in an action for the foreclosure of a mortgage of personal property. The appellant (mortgagor) has executed the usual undertaking on appeal for $300.

The judgment in this case was rendered in accordance with Section 726, Code of Civil Procedure. The Code prescribes no bond in addition to the $300 bond in such a case. Section 949 provides that in cases not provided for in the sections therein named, the appeal is perfected by giving the undertaking provided in Section 941. Such being the statute, we must be governed by it.

The motion is granted.

DEPARTMENT No. 2.

[Filed October 24, 1883.]

No. 8161.

McAFEE ET AL., RESPONDENTS, v. FISHER, APPELLANT.

TIME—INSTRUMENT—ACTION. The action on the instrument sued on is held prematurely brought. It provided the payment was "to be mutually arranged," and it did not appear that the time of payment had ever been arranged between the parties to it. *Further held*, defendant is not estopped to aver that the same was not due when this action was brought.

Appeal from Superior Court, San Francisco.

Greathouse & Blanding for respondents.

V. Neale for appellant.

THORNTON, J., delivered the opinion of the Court:

This is an action brought by the assignees of the payee Dore, hereinafter named, to recover upon the following instrument in writing:

"$5,591. "San Francisco, Nov. 3d, 1877.

"Due Mr. Maurice Dore the sum of five thousand five hundred and ninety-one dollars, in settlement of land purchase in Sutter County, the payment of which to be mutually arranged. "Morton C. Fisher."

It is evident that the time of payment of this money was to be arranged between the maker and payee. If the words "the payment of which to be mutually arranged" in the foregoing instrument mean anything whatever, it is that the time of payment was to be thereafter fixed and agreed on by the parties, Dore and Fisher. We perceive nothing else open to be "mutually arranged." The amount in money was fixed and the consideration agreed on and mentioned in the paper, viz.: "In settlement of land purchase in Sutter County." It nowhere appears, either in the evidence or the finding, that the time of the payment has ever been arranged between the parties referred to. The action then is prematurely brought unless it appears that the defendant is estopped to aver that the same was not due when this action was brought.

It is found upon this point as follows: "That prior to the 17th day of November, 1877, and before accepting said due bill or obligation, plaintiffs went to said defendant Fisher and told him that they contemplated purchasing the same, and asked him if the same was a valid instrument given and delivered for a *bona fide* indebtedness, and would be paid upon demand; and that said Fisher expressly represented to plaintiffs that said instrument was valid and binding, and had been executed and delivered to him by said Dore in the ordinary course of business, and for a full and valuable consideration; and told said plaintiffs that it was all right, and would be paid; and that said plaintiffs thereupon executed and delivered to said Dore a full and complete release and discharge of said Dore of and from all claims and indebtedness due said plaintiffs from him, said Dore, and particularly of and from the indebtedness from said Dore to plaintiffs, in payment of which said due bill or obligation was proposed to be and was thereafter indorsed and transferred to them by said Dore, and took and accepted said Fisher as their debtor, in place and instead of said Dore, whom they then and there released as aforesaid."

The facts contained in this finding, while estopping defendant from denying the validity of the instrument, do not estop him from denying that the time of payment had not arrived. It is not found that defendant ever told the plaintiffs that the money mentioned in this action was due and payable before action brought. The finding is that "said Fisher expressly

represented to plaintiffs that said instrument was valid and binding, and had been executed and delivered to him by Dore in the ordinary course of business and for a full and valuable consideration, and told said plaintiffs that it was all right and would be paid."

There is no finding here that the instrument would be paid on demand.

According to the finding, Fisher only said "that it was all right and would be paid." He did not say when it would be paid. What he said was perfectly consistent with the purport of the paper, that it would be paid when the time of payment had been mutually arranged, that is, agreed upon by Dore and the defendant. The meaning of the language of the paper is a question of law, and its meaning was, in contemplation of law, as well known to the plaintiffs as defendant. We cannot see under the facts found that there was any estoppel by the acts and words of Fisher, by which he was estopped from averring and proving herein that the instrument had not matured for payment when this action was begun.

It follows from the foregoing that the judgment and order must be reversed and cause remanded, and it is so ordered.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed October 22, 1883.]

No. 7559.

FOYE, RESPONDENT, *v.* SIMON ET AL., APPELLANTS.

VENUE. Action for damages for failure to comply with contract for sale of wool. *Held*, defendants were entitled to an order changing the place of trial to that of their residence.

Appeal from Superior Court, Fresno County.

Tupper & Tupper for respondents.
Jno. C. Burch for appellants.

By the COURT:

The defendants were entitled to an order changing the place of trial to the city and county of San Francisco, their place of residence. (*Cooke* v. *Pendergast*, 9 Pac. C. L. J., p. 755.)

Order reversed and cause remanded, with instruction that an order be made, transferring the cause to the Superior Court of the city and county of San Francisco.

DEPARTMENT No. 2.

[Filed October 22, 1883.]

No. 7899.

PEOPLE, RESPONDENT, *v.* APPLEGARTH, APPELLANT.

SUMMONS—LAND—CERTIFICATE OF PURCHASE. In action to foreclose and annul a certificate of purchase and right in a location of school lands, for non-payment of interest, the service of summons by publication must be in accordance with the provisions of the Code of Civil Procedure.

Appeal from Superior Court, Fresno County.

W. D. Grady for respondent.
W. D. Tupper for appellant.

By the COURT:

The service of summons by publication in such a case as this should have been made in accordance with the provisions of the Code of Civil Procedure. The four Codes constitute but one statute (Pol. C., Sec. 4480), and we are of opinion that the provisions of the Political Code must be read in connection with the provisions of the Code of Civil Procedure on this subject. Under the latter provisions there must have been an affidavit for publication of summons and an order of the Court or Judge thereon.

The judgment and order are reversed and the cause remanded.

DEPARTMENT No. 1.

[Filed May 30, 1883.]

No. 7845.

CALLAGHAN ET AL., APPELLANTS,
v.
HICKEY ET AL., RESPONDENTS.

DEFAULT—RULE—JUDGMENT. The taking and entry of the judgment were in violation of a rule of the trial Court, and the judgment was irregular; being irregular, upon the showing made by defendant, the Court properly set it aside and allowed defendant to answer the complaint.

Appeal from Superior Court, San Francisco.

Carroll Cook for appellants.
R. P. Wright for respondents.

In the absence of defendants' counsel the Court overruled a demurrer which had been interposed by the defendant to the plaintiff's complaint, without giving time to the defend-

ant to answer. But there was a rule of the Court which provided as follows: "Rule XVI: When a demurrer to any pleading is sustained or overruled the adverse party shall have five days within which to amend or answer after receiving notice of the ruling of the Court. When a demurrer to the complaint has been overruled for want of an appearance of the party demurring, or where, in the opinion of the Court, the demurrer was frivolous or interposed for delay, leave will not be given to the party to answer such compaint, except upon condition that such party files and serves a verified answer, or an affidavit of merits, within five days, or such further time as may be allowed by the Court or Judge thereof."

Instead of giving the notice required by the rule, the paintiff, immediately after the overruling of the demurrer, took judgment against the defendant, and had the same entered against him. The taking and entry of the judgment were in violation of the rule of the Court, and the judgment was irregular, and being irregular, upon the showing made by the defendant, the Court properly set it aside, and allowed the defendant to answer the complaint.

Order affirmed.

DEPARTMENT No. 2.

[Filed October 23, 1883.]

No. 9236.

BARBAIRES v. GREGORY.

STATEMENT—NOTICE—PRACTICE. Upon this application for a writ of mandate to compel the trial Court to settle a statement, it is held that the Court had a right to proceed and settle a statement on the day designated for that purpose, and that defendants' counsel in the action there pending were not entitled to notice that the statement would be settled at the time and place fixed by them for its settlement in a notice given by themselves.

By the COURT:

It was admitted on the argument by both sides that the defendants in the action *Mizner* v. *Barbaires, et al.* prepared and served their statement on the plaintiff's attorney in due time and that he prepared and served on the defendants' counsel plaintiff's proposed amendments to said statement within the time prescribed by the Code, and that defendants' counsel within ten days after receiving said proposed amendments gave the plaintiff's attorney notice that his said proposed amendments were not adopted or allowed by the defendants, and that on a day and hour and at a place named

in said notice they would present said statement and proposed amendments to the Judge for settlement. That at the time and place named in said notice the plaintiff's attorney appeared before said Judge, but that no one appeared for the defendants, and the Court proceeded to settle said statement. Before the time fixed in said notice for the settlement of said statement and proposed amendments the same had been filed with the clerk of the Court. The defendants' counsel insists that the fact of his having so filed said statement and proposed amendments, cast the duty upon the Court of giving said defendants' attorneys notice of the time and place of settlement, and that the Court had no power to proceed and settle said statement on the day fixed for its settlement in defendants' attorney's said notice. We think, however, that the Court had a right to proceed and settle said statement on the day designated for that purpose and that defendants' counsel were not entitled to notice that the statement would be settled at the time and place fixed by them for its settlement in a notice given by themselves.

Application denied and proceeding dismissed.

DEPARTMENT No. 2.

[Filed October 23, 1883.]

No. 7689.

DEAN, APPELLANT, v. BAKER, RESPONDENT.

INSOLVENCY. Action on a promissory note, and the defense a discharge in insolvency proceedings. *Held*, under Section 32 of the Insolvency Act of 1852, error was committed in ruling out plaintiff's offer to prove that defendant G. had willfully, knowingly and intentionally omitted from the schedule of property annexed to his petition in insolvency certain real property held and owned by him at the time of the commencement of the insolvency proceedings.

Appeal from Superior Court, Merced county.

Bennett & Wiggington for appellant.
R. H. Ward and *Schell & Treat* for respondents.

By the COURT:

We are of opinion that under Section 32 of the Insolvency Act of 1852, the Court erred in ruling out the offer of the plaintiff to prove that the defendant Grimes had willfully, knowingly and intentionally omitted from the schedule of property annexed to his petition in insolvency certain real property held and owned by him at the time of the commencement of the insolvency proceedings; and for this reason the judgment is reversed and the cause is remanded.

IN BANK.

[Filed October 23, 1883.]

No. 10,891.

EX PARTE REIS.

REPORTER—COURT. The Superior Courts in San Francisco have power to fix and order paid the compensation of the phonographic reporter in criminal cases, and the duty is imposed upon the County Treasurer to pay the same upon the order of the Court.

Habeas Corpus.

City and County Attorney and *O. P. Evans* for petitioner.
Clunie & Knight—Contra.

MCKINSTRY, J., delivered the opinion of the Court:

Immediately prior to the adoption of the Codes the law with respect to phonographic reporters of the Courts in San Francisco was contained in the Act of March 13, 1866, (Stats. 1865–6, p. 232), and the Act of March 28, 1868 (Stats. 1867–8, p. 425). The first Act authorized the District Judges of San Francisco to appoint shorthand reporters, and provided that, in criminal cases, the compensation of the reporter "shall be fixed by the Court, *and paid out of the treasury of the county—on the order of the Court.*" The Act of 1868 provided for the appointment of a reporter by the County Judge of San Francisco, and the payment of his compensation in like manner.

Sections 269–271 of the Code of Civil Procedure as they read originally—since amended in particulars which do not effect the question we are considering—authorized each District and County Judge in the State to appoint a shorthand reporter, and provided that "in criminal cases, * * the compensation of the reporter must be fixed by the Court, and paid out of the treasury of the county in which the case is tried, *upon the order of the Court.*"

The statutes of 1866 and 1868, above referred to, were not "expressly continued in force" by the Code of Civil Procedure. They were therefore "repealed and abrogated" (C. C. P., Section 18), unless kept alive by Section 19 of the Political Code.

That section reads: "Nothing in either of the four Codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws:

"1. All Acts incorporating or chartering municipal corporations, and Acts amending or supplementing such Acts.

"2. All Acts consolidating cities and counties, and Acts amending or supplementing such Acts." * * *

It is not necessary to decide whether the Acts of 1866 and 1868 were Acts "affecting" or "amending or supplementing" the Consolidation Act or charter of the City and County of San Francisco.

If, by virtue of Section 19 of the Political Code, the Acts of 1866 and 1868 were continued in force, the District Judges and the County Judge, in San Francisco, had power under those Acts to appoint reporters, and to fix their compensation in criminal cases, to be paid by the Treasurer "upon the order of the Court." If, on the other hand, the Acts of 1866 and 1868 were repealed by the Code of Civil Procedure, Sections 269–271 of that Code conferred like powers upon the District Judges and Courts and County Judge and Court. In either case, just before the adoption of the present Constitution, the District Courts and County Court could legally employ the power of appointing a shorthand reporter, fix his compensation in criminal cases, and order such compensation to be paid, and it was the duty of the Treasurer to pay the same "upon the order of the Court."

Section 11 of Article 22 of the present Constitution reads: "All laws relative to the present judicial system of the State shall be applicable to the judicial system created by this Constitution until changed by legislation."

Of course the former "judicial system" was not made applicable to the judicial *system*, or series of Courts, created by the Constitution of 1879, for the latter was substituted for the former. By "laws relative to the present judicial system" was intended laws passed to render the working of the system harmonious and effective, which would include the laws passed to secure the preservation of evidence, and the payment of compensation to the officers through whose agency it was preserved.

Either the Acts of 1866 and 1868 (if not repealed by the Code of Civil Procedure), or the sections of the Code of Civil Procedure relating to the same subject, were therefore made applicable to the judicial system created by the Constitution now in force; the powers previously conferred upon the District Judges and Courts and County Judge and Court, with respect to the appointment and compensation of reporters, were transferred to the Superior Judges and Courts.

It follows, the Superior Courts in San Francisco have power to fix and order paid the compensation of the phonographic reporter in criminal cases, and the corresponding duty is imposed upon the Treasurer to pay the same upon the order of the Court.

The petitioner is remanded.

We concur: Sharpstein, J., Ross, J.

CONCURRING OPINION.

Phonographic reporters were first appointed in this State as adjuncts to Courts under the provisions of the Act of May 17, 1861, (See Stats. 1861, 497.) That Act authorized the Judges of each of the Fourth, Sixth, Seventh, Tenth, Twelfth and Fifteenth Judicial Districts to appoint such an officer, and provided *inter alia* (see Sec. 3), "that in criminal cases or capital offenses, when the testimony has been taken down by order of the Court, the compensation of the reporter shall be fixed by the Court, and paid out of the treasury of the county in which the cause is tried, in the same manner as the fees of trial jurors are paid in such cases." In 1862 the third section of this Act was amended, but the provision as to the compensation of the reporters was not changed. (Stats. 1862, 253.) The first section of the Act of 1861 was amended in 1864 (Stats. 1863–64, 524), in which this new feature appeared, that the reporters appointed, were required before entering upon their duties, to "take and subscribe the oath prescribed by law for attorneys and counselors at law, practicing in the Courts in this State." It is not too much to say that this made such reporters officers of the Court. They were, to some extent, under the order of the Court, and subject to its control. They performed their duties under the eye of the Court, and became like clerks and bailiffs, officers of the Courts to which they were attached.

The Act of March 13, 1866, entitled "An Act concerning District Court Reporters," (see Stats. 1865–66, 232) was the next act on the subject. The third section of this Act was amended by the Act of 18th of March, 1868, (Stats. 1867–68, 455). Each of these last-named Acts had the same provision (see the third section) in regard to the payment of the fees of the reporter in criminal cases, in these words: "In criminal cases or capital offenses, when the testimony has been taken down by order of the Court, the compensation of the reporter shall be fixed by the Court, and paid out of the treasury of the county in which the case is tried, on the order of the Court." A change will here be observed from

the former Acts referred to. The Act of 1866 related to the Judges of the Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, Twelfth, Third and Fifteenth Districts. By the Act of March 30, 1868, the provisions of the Act of 1866 were extended to the Second Judicial District with a *proviso* of no consequence touching this case. (Stats. 1867–68, 668). The Act was further extended by Act of 1870. (Stats. 1869–70, 330.) This was all the legislation on this subject-matter prior to the adoption of the Codes.

These Acts and the proceedings under them had no reference to the Act commonly called the Consolidation Act. They had no more connection with it than they had with the charters of the cities of Sacramento, Stockton and San José. At the time these Acts were passed, the city and county of San Francisco was embraced within the Fourth, Twelfth and Fifteenth Judicial Districts, the City of Sacramento was in the Sixth, the City of Stockton was in the Fifth, and the City of San José was in the Third. Each of these counties had Boards of Supervisors, and in no one of them is any reference made to a Board of Supervisors, or Auditor of any political division in the State.

These Acts had nothing to do with the municipal governments of counties or cities, or cities and counties, so as to be under the control of the governing bodies or officers of such political divisions. They were a part of the judicial machinery of the State, assistants of the Judges in the discharge of their responsible functions, and furnishing valuable aid to counsel in the rendition of their professional services to litigants. They expedited the administration of justice and afforded a means by which the occurrences of a trial could be correctly preserved, for the use and advantage of Court and counsel, and giving further assurance to every litigant that no matter of fact or point in his case would be omitted or overlooked. It was specially advantageous in criminal causes, a history of all the incidents of which being written while the events constituting it were occurring. It may be said that the facts were photographed as they appeared, and the negatives of phonographic characters were laid up for future use and reference. The achievements of the reporters under these acts constituted a most valuable part of the administration of justice, and have been since the first Act was enacted, extended so as to apply to nearly all the Courts of the State.

Thus the legislation continued until the Codes were adopted in 1872, and which went into operation on the first of January, 1873. The provisions in relation to Phono-

graphic Reporters, are found in C. C. P,, Sections 269, 270, 271, *et seq.* By Section 269 as it originally passed, the power to appoint such reporter was vested in the Judge of each judicial District and in each County Judge. (2 Hittell's Codes and Stats. p. 944, note a to par. 10,269. This section was amended in 1874 so as to give such appointing power to the Judge of each Court of record. The provisions as to compensation will be found in Section 271. This section was amended in 1874, but in both the language as to compensation is the same as in the Acts of 1866 and 1868, above quoted. This provision underwent a change in 1880, when by amendment it assumed this form: "In criminal cases, when the testimony has been taken down or subscribed upon the order of the Court, the fees of the Reporter shall be certified by the Court, and paid out of the treasury of the county or city and county in which the case is tried, upon the order of the Court." (See Amendments to Codes of 1880, 55.)

We see nothing in this change which divests the Court of power to fix the compensation of the Reporter. The power to fix is implied by the power to certify. The greater power includes the less. The power to fix is a mean by which the Court reaches the result which it is called on to certify, viz: the amount of the fees or compensation.

These provisions of the C. C. P., as to reporters, are found in Title IV, Part I. Part I relates to Courts of justice, and Title IV of this part to ministerial officers of Courts of justice. (See "Summary of Contents" in Olney's 4th Ed. C. C. P.) Chapter III of Title IV treats of Phonographic Reporters as ministerial officers of Courts of justice in California. In the view of the law-making power these reporters were regarded as official adjuncts of the Courts of justice, and we think the testimony of Bench and bar would be universal that they are most valuable adjuncts. They are officers of the Court and take an oath as such. (C. C. P. Sec. 272.) The legislation on the subject shows that the laws relating to Phonogaphic Reporters pertain to the judicial system of the State, and are part and parcel of it, and so have been ever since their adoption, at least since the adoption of the Codes.

Reference is made to Section 19 of the Political Code as bearing on this subject. In that section it is provided: "Nothing in either of the four Codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws:

"1.—All Acts incorporating or chartering municipal corporations, and acts amending or supplementing such acts."

"2.—All Acts consolidating cities and counties, and acts amending or supplementing such acts."

That by these provisions the Consolidation Act and the Acts amending or supplementing it, were continued in force, except so far as they were repealed or affected by subsequent legislation, there can be no doubt. But the provisions of that Act were not enlarged by this section. It recognized it as existing, unrepealed and unaffected by anything in the four Codes. It remained the same as it was before the passage of the Codes, giving jurisdiction to the officials of the municipality over the same subjects and the same demands upon the city and county treasury, which it conferred before the Codes became law and no other. Those demands were defined in the Acts referred to, but there was no demand among them relating to the compensation of phonographic reporters. Such a demand was never a part of the municipal business; although the laws relating to such reporters had been in existence before the adoption of the Codes, allowing their compensation to be fixed by the Court and paid out of the county treasuries, by the order of the Court, the Boards of Supervisors had had nothing to do with such demands, or if they did have anything to do in passing on such demands, such action was superogatory and extra jurisdictional. The order on the Treasurer to pay the demand on the *allocatur* of the Court was imperitive and unqualified, and there can be no doubt that the Treasurer was protected by law in making such payment. Section 95 of the Consolidation Act specifies the demands payable out of the city and and county treasury (see Stats. 1856, pp. 172–3), and we look in vain in it, at any period of its exietence, for any provision authorizing the payment of compensation to phonographic reporters.

The Section 97 of same Act restricts all demands payable out of the treasury of the city and county to those within the powers of the Board of Supervisors under the Act, and Section 98 expressly inhibits the payment at any time of any expenditure not authorized by the Act. The powers of the Board of Supervisors are enumerated in Section 74 of the Act, and we cannot find at any period of the existence of this Section, or in any phase which it has assumed, any power vested in such Board in relation to the compensation of phonographic reporters.

That the demands referred to in the Consolidation Act are those mentioned in and authorized by it, is further clearly

shown by the language used in Section 82, to this effect: "No payment can be made from the treasury or out of the public funds of said city and county *unless the same be specifically authorized by this Act*, nor unless the demand which is paid be duly audited, as in this Act provided, and that must appear on the face of it." (See Art. VI of Consolidation Act on Finance and Revenue, and Section 68 of same Act.)

The provisions of the Code of Civil Procedure above referred to repeal nothing of the Consolidation Act. But it may be said, if it does not repeal, it affects that Act. How? It would be difficult to point out. If the provisions of the Consolidation Act are left untouched, if its officers exercised the same powers and discharged the same functions under this Act after as before the Code legislation alluded to, we cannot perceive that the Act is affected. That the powers of the officers are changed or their duties interfered with, nowhere appears. It does not act upon, or produce an effect on or change (see Webster's definition of "affect") any of the provisions of the Consolidation Act, and if it does not act on, or produce an effect on or change any of the provisions of that Act, it can scarcely be held that such act is affected. The Code legislation may, and does, superadd a duty to an officer, the Treasurer, which he was not called on to discharge before. It does this by an independent and distinct statute. But this does not affect any power or duty vested in him by the Consolidation Act. Those duties remain as they were, and another one is added. To say that this additional duty cannot be imposed on any officer of the corporation, is to deny to the Legislature the power conferred on it by the paramount organic law.

Treating the four Codes as parts of the same statute (Pol. Code, Sec. 4,480), it becomes the duty of the judiciary in their interpretation, to reconcile all conflicts, if it can be done. And conceding that the above cited provisions of Section 19 of the Political Code and the sections of the Code of Civil Procedure in regard to phonographic reporters seemingly conflict, they ought to be so construed as to make every word of each have its proper meaning and effect, and this can be easily done by referring the provisions of the Consolidation Act to the objects for which it was intended, and the provisions of the Code of Civil Procedure to the objects for which it was enacted, in accordance with the rule of distributive construction expressed in the Latin maxim *reddendo singula singulis*.

It would be very strange if the compilers of the Codes had inserted a provision in the Code of Civil Procedure conflict-

ing with a statute continued by the provisions of the Code, with a declaration that nothing in the Codes should affect this statute, and that the Legislature should have enacted the Codes in the same shape. Certainly, it never was in the contemplation of the framers of the Codes, or of the Legislature enacting them, that anything in the Code of Civil Procedure in relation to phonographic reporters had any reference to any provision of the Consolidation Act or affected any of its provisions.

There are other declarations in the Code of Civil Procedure inserted as rules for its interpretation, which go to show that the provisions as to reporters were never intended to conflict with or affect, and did not conflict with or affect anything contained in the Consolidation Act. Thus, Section 4, Code of Civil Procedure, declares: "The Code establishes the law of this State respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

We know no other statute in the State in regard to phonographic reporter than the provisions of the Code of Civil Procedure, and those provisions under the rule laid down in Section four above cited, *establish the law* on the subject to which it relates, viz, phonographic reporters. Can it be said in the face of this clear and distinctive declaration, that the provisions of the Code of Civil Procedure on this matter are in any way superseded, affected or changed by any other statute, even by the Consolidation Act?

Again Section five, C. C. P., provides: "The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments."

This is in part a rule of construction, and as such its meaning is that words used in former statutes on the same subject have the same meaning in this Code as in the former statute, which statute is repealed, whether consistent with the provisions of the Code or not. (Section 18, C. C. P.)

It would in our judgment be a strained construction to hold that the Code of Civil Procedure did not establish the law of this State in regard to phonographic reporters, their compensation and mode and manner of payment.

Whether the Consolidation Act can be changed by general laws enacted by the Legislature, is a question which does not arise in this case, as there is nothing in the Act mentioned, relating in any way to phonographic reporters.

But conceding that such question does arise, it is very easy of determination. The Constitution expressly declares that "cities or towns heretofore or hereafter organized, and and all charters framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws." (Const., Sec. 6 of Article XI.) It would be difficult to use language more plainly and clearly declaring that all cities or towns whenever organized, shall be subject to and controlled by general laws, and all charters thereof framed or adopted by virtue of the Constitution shall also be subject to and controlled by general laws. That this provision applies to the city and county of San Francisco is plainly declared in Section 7 of the same article. This could hardly be otherwise under a Constitution in which the broad legislative power is vested in a Legislature, without restriction on the power of enacting general laws. The restrictions on the legislative power extend only to special and local statutes. There are none in regard to its exercise of the power by general legislation. Now, to hold that a charter of a city or city and county is beyond the reach of general laws passed by the Legislature would be to place the power of a part of the State over the power of the whole; to accord a greater power to a particular district, and that a very small district, than to the whole State. The order of things by such a ruling would be reversed, and a beneficial exercise of the central power would be neutralized by a local authority and the rights of the citizens of the State out of such locality would be affected by a legislation entirely beyond their control, even when acting with all the representatives of the other portions of the State, convened as a Legislature in Senate and Assembly. The evils of local and special laws are not found in general legislation. General laws are enacted by all the representatives of the people. Each representative knows when he casts his vote that such a law will act upon his constituents and himself, and may affect their and his interests. Such is not the case with local and special laws. They only affect a district or class, and the majority of the Legislature frequently impose such laws on a minority with a reckless disregard of right, because such laws do not operate upon their constituents nor themselves. Their constituents and themselves are safe from the consequences of such unrighteous laws; and careless of the rights of others who are a powerless minority in the spirit of *apres nous le deluge*, the majority enacts laws, oppressive of such feeble minority. (*Vanzant* v. *Waddell*, 2 Yerg. 260, 269; *Walley's Heirs* v. *Kennedy*, *id.* 556–7.)

This law concerning reporters is a general law. The compensation of the reporters is fixed by a Judge, elected in the city and county by the same constituents who elect the Board of Supervisors, and the other officers of the city and county, and all are responsible for misconduct in office to the same constituency. Thus the local influence is as much felt by the Judge as by the officials of the city and county, and every guarantee for a faithful and honest discharge of official duty is had in the case of the judicial incumbent as of the Board of Supervisors. The danger of lack of local influence and local responsibility is no less in the case of the Judge than of the officers of the municipality.

There is another consideration which is entitled to be regarded in the discussion of this subject. The law in relation to phonographic reporters appertained to the judicial system of the State, and constituted a part of it. Such laws were kept in existence by the 11th section of Article XXII of the Constitution, until changed by legislation. It would be strange if the administration of such a law were committed to Boards of Supervisors or other officers of a municipality. Some degree of discretion is left to the official administering this law. The compensation must be fixed by the Court, or the fees certified by the Court. (Sec. 274 C. C. P.) Such duty appertains to the Court. (As to the power of a Court of record to appoint its assistants see the able opinion of Dixon, C. J., in *in re* Janitor, Supreme Court 35 Wis. 410-417.) Would it not be peculiarly strange if a Board of Supervisors was to be required to supervise the action of a Court, under a form of government where the judicial, executive and legislative functions are distinctly separated by the organic law? We think this would be an anomaly in legislation, which does not appear in our statutes. That a Board of Supervisors should review and reverse or modify the action of a Court of general jurisdiction would be a thing unheard of in our system. If the Board, under the city charter, can act on such claim it can disallow it, or it can allow in part (Secs. 83, 85, 92 Consol. Act). It may cut down the compensation so that no competent reporter can be found to undertake the work. It may reject the demand so that the reporter will be put to the delay and expense of a suit to obtain his pay. Thus the administration of the law in criminal cases would be embarrassed and impeded. An unseemly and unfortunate conflict between two departments of the Government may thus be brought about, which should by all means be avoided. It is no answer to this to say that it is highly improbable that

such a conflict will ever occur. Stranger things have happened. It may occur, and an interpretation of the law which might allow it should not be made.

What is said above applies to any presentation made to the Auditor for his action. Such action is not required.

The legislation of this kind is not new. Witnesses in criminal cases were required to be paid by a provision of the Penal Code out of the county treasury by the County Treasurer upon the order of the County Judge. The production of the order or a certified copy of it was alone required to make it the duty of the Treasurer to pay it. (Sec. 1329 Penal Code.) Such was Section 1329 as it was originally framed. It was afterwards modified by amendment in 1876. By this change the Court in one case, and the Judge of the Court in all others, were empowered to direct by written order the Auditor to draw his warrant on the Treasurer, "in favor of witnesses for a reasonable sum, to be specified in the order, for the necessary expenses of the witness." No intervention of the Board of Supervisors is required here, nor does it affect the Consolidation Act for the reasons above set forth. The Legislature fixes the mode of audit and payment, in this as in all other cases, out of county or city or city and county treasuries, within the constitutional limits, and the law is valid.

See also the power given to the Judges of the Courts to create a charge on the county, or city and county treasuries by Section 144 C. C. P., where suitable rooms for holding Courts and the chambers of Judges thereof are not provided in any city and county, or county, by the Supervisors thereof. Here a charge is created against the treasuries of the political divisions mentioned, in opposition to the action of the Board of Supervisors.

It will be observed that the provision as to payment of compensation to the reporters in criminal cases in the first Act passed on the subject (Stats. 1861, p. 498), was that the compensation should be fixed by the Court and paid out of the treasury in the same manner as the fees of trial jurors are paid in such cases. The statute as to the payment of trial jurors may be seen in Parker's Supplement to General Laws of California, par. 8084, p. 160. This payment was to be made on the certificate of the Clerk of the Court, out of the county treasury as other county dues. If this should be held to require the action of the Board of Supervisors or of the Auditor, then the change made by the Acts of 1866 and 1868 becomes very significant, and plainly indicate that no action of Board or Auditor is required.

I am of opinion that the order of the Superior Court is within its jurisdiction, that the application should be dismissed, and the petitioner remanded to the custody of the Sheriff of the city and county of San Francisco.

THORNTON, J.

I dissent: McKee, J.

IN BANK.

[Filed October 10, 1883.]

No. 7695.

HUBERT, APPELLANT, *v.* MENDHEIM, RESPONDENT.

OFFICIAL BONDS—DEPUTY-TREASURER. Where an officer is chosen for two successive terms, his official bond, given at the commencement of his first term, only covers his conduct during such term; and the same rule applies to bonds executed by a deputy to his principal.

ID. The bond executed by C, the deputy, is none the less an official bond because it is made payable to plaintiff and not the State of California.

ID. Every bond demanded of and given by a deputy for the faithful discharge of his duties (however in other respects it may fail to comply with the form directed by the Code) is an official bond. It may be sued as such by the State or any person interested, and the same damages recovered as if there were no defects of form.

ID. If the principal officer is chosen for a second term, he is not, during the second term, the appointing power which nominated deputies during the first term, any more than would another person if elected to the second term constitute the appointing power which had named the deputies of his predecessors in office.

ID. An official bond has reference to a particular official term.

ID. If a County Treasurer shall be re-elected and the deputy continue, the retention of the latter by the former may be construed, as against the Treasurer, to be a reappointment; but the deputy holds his place by virtue of the implied reappointment, and not under his original appointment.

ID. No principle of public policy would seem to prohibit an officer from requiring for his personal protection security beyond the official bond, which protects also the State and third persons.

Appeal from Superior Court, San Francisco.

J. P. Hoge for appellant.
Lloyd, Newlands & Woods for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

The objection taken under the demurrer to the third cause of action as stated in the complaint is that the bond therein mentioned is not an *official* bond, and is therefore void; the objection to the first and second counts is that they do not allege moneys to have been misappropriated by *Casebohm*,

deputy, during the term for which he was appointed deputy—it being averred that plaintiff was Treasurer for more than one term.

It is not necessary to decide that the bond is good as a common law obligation. It is proper to observe, however, that it is by no means a corollary from the proposition that plaintiff might have been compelled, by *mandamus*, to require an official bond from his deputy, that a private obligation of defendant, which he chose for a consideration to assume, would be *void*. No principle of public policy would seem to prohibit an officer from requiring for his personal protection, security, beyond the official bond, which protects also the State and third persons.

1. We think the third count of the complaint contains a statement of a cause of action. The demurrer to the third count, as well as the general demurrer to the whole complaint, should have been overruled.

If the bond sued on is an *official* bond, the obligors are bound to the extent and to the persons that others are bound who execute official bonds. Nor, in presence of the averments of the complaint, at least, can the plaintiff add to the liability of the defendant by treating the instrument as a common-law bond.

The sections of the Political Code which bear upon the point presented, under the demurrer to the third count of the complaint, are as follows:

"Section 958. All official bonds must be in form, joint and several, and made payable to the State of California in such penalty and with such conditions as required by this chapter, or the law creating and regulating the duties of the office.

"Section 959. Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein, for any and all breaches of the conditions thereof committed during the time such officer continues to discharge any of the duties of or hold the office, and whether such breaches are committed or suffered by the principal officer, his deputy, or clerk.

"Section 960. Every such bond is in force and obligatory upon the principal and sureties therein for the faithful discharge of all duties which may be required of such officer by any law enacted subsequently to the execution of such bond, and such condition must be expressed therein.

"Section 961. Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the State of California, and

to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity; and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof.

"Section 962. No such bond is void on the first recovery of a judgment thereon; but suit may be afterwards brought from time to time, and judgment recovered thereon by the State of California, or by any person to whom a right of action has accrued against such officer and his sureties, until the whole penalty of the bond is exhausted.

"Section 963. Whenever an official bond does not contain the substantial matter or conditions required by law, or there are any defects in the approval or filing thereof, it is not void so as to discharge such officer and his sureties; but they are equitably bound to the State or party interested; and the State or such party may, by action in any Court of competent jurisdiction, suggest the defect in the bond, approval or filing, and recover the proper and equitable demand or damages from such officer and the persons who intended to become and were included as sureties in such bond.

"Section 985. Every officer or body appointing a deputy, clerk, or subordinate officer may require an official bond to be given by the person appointed and may fix the amount thereof."

All the sections of the Political Code above recited, except Section 985, are re-enactments of provisions of the statute of 1850, which were in force when decisions were made by the Supreme Court of the State, hereinafter cited, to the effect that where an officer is chosen for two successive terms, his bond given at the commencement of his first term only covers his conduct during such term.

The bond executed by *Cassebohm* is none the less an *official bond* because it is made payable to plaintiff and not the State of California. (Sec. 963.) Every bond demanded of and given by a deputy for the faithful discharge of his duties (however in other respects it may fail to comply with the form directed by the Code), is an official bond. It may be sued as such by the State or any person interested, and the same damages recovered as if there were no defects of form. (Sec. 963.) True, Section 963 directs that the plaintiff shall "suggest the defect in the bond." But the bond, although it "does not contain the *substantial* matter or conditions required by law" is nevertheless an official bond. (Sec. 963.) Of course the words last quoted do not authorize the Courts

to change a writing entirely irrelevant into an official bond. The writing as to which the suggestion is to be made must be a *bond*, given by an officer or his deputy to secure the discharge of his duties. But being such it is an official bond. Any defect in *its form* must appear on the face of the instrument. The action provided for in Section 963 is not a bill to reform the instrument so as to make it conform to the provisions of the Code. It is only necessary that the defect be suggested, and thereupon, if the breach is proved, the Court is authorized to render a judgment, precisely as if the bond conformed in every respect to the statutory requirements.

Conceding, for the purpose of the argument, that the suggestion of the defect should be made in the *complaint*, the mere omission of a formal averment that the plaintiff "suggests" the bond is defective in that it is not in terms made payable to the State of California, authorizes neither the plaintiff nor defendant, in the case at bar, to deny that the bond is an official bond. If the section of the Code requires a technical suggestion on the record with reference to the defect, for the purpose of calling the attention of the Court to it, no particular form of words is necessary to accomplish that object. It is difficult to suppose a sufficient complaint could be framed in an action brought for damages arising from the breach of the bond; which would not suggest its defects in form; since in every such action the bond should be set forth *in hece verba*, or its substantial parts averred, in their legal effect. However this may be, in the case at bar a copy of the bond is attached to the complaint. By the record the attention of the Court was called to the fact that the bond sued on was an official bond, defective as to certain matters of form.

By thus suggesting the defect in form the plaintiff, a person injured by the default of *Cassebohm*, and authorized to bring suit upon his official bond, is estopped from claiming that the bond is not an official bond. On the other hand the defendant cannot say the bond is unofficial, because he has executed an instrument which could be and has been declared upon as an official bond, and which he must have known could be so declared upon when he executed it.

2. The bond being an official bond, do the first and second counts of the complaint, respectively, state a cause of action?

By Section 4112 of the Political Code the Treasurer is authorized to appoint as many deputies as he may deem necessary, but it would seem that provision has been made by law for the payment of salaries to but two deputies. (Act of 1869–70, p. 122.)

Section 878 of the Political Code refers to *deputies*, as well as to principal officer whose appointment is not elsewhere provided for. In Section 876 deputies are called "subordinate officers." Section 878 reads:

"Sec. 878. Every office of which the duration is not fixed by law, is held at the pleasure of the appointing power."

The power of appointing deputies, however, is in the principal *officer*, and not in the *man*, and the official existence, past and present, of the principal officer must be regarded, during a term, as limited by the commencement and end of such term. The powers of the principal officer, including his power to appoint, must be regarded during a term, as in like manner limited. If the principal officer is chosen for a second term, he is not, during the second term, the appointing power which nominated deputies during the first term, any more than would another person if elected to the second term constitute the appointing power which had named the deputies of his predecessor in office. If the same man shall be elected for two successive terms, and shall retain into the second term a deputy appointed for the first—even without formal re-appointment in writing or requiring of him a second bond—he, the officer, must be held to have re-appointed the deputy, and may then indulge the pleasure of removing him, because, under Section 878, the second appointment of the deputy, like the first, is at the pleasure of the appointing power.

The deputy of an executive officer is an assistant empowered by law to act in the name of the officer. He is appointed by the principal officer, but his authority is derived from the statute which permits his appointment. His functions are those of the *officer* in whose stead he discharges them. He is not the private agent of the individual who holds the office. So far as we are informed, it has been the uniform practice, certainly it is the duty, of the in-going officer, if he desires to continue any deputy of his predecessor, to re-appoint him. A conract extends only to the things concerning which it appears the parties intended to contract. Upon his re-election to the office of Treasurer the plaintiff was required to give a new official bond, and the deputy whom he continued in place should also have been required to give a new official bond. Both the plaintiff and defendant knew this when the bond before us was executed. It cannot be presumed that defendant contemplated the plaintff's probable re-election, and in case of re-election, that plaintiff would fail to demand new security of his deputy, and there-

upon defendant be bound by the instrument he had executed as a continuing obligation. Suppose, at the commencement of the second term, *Cassebohm*, on demand of plaintiff, had given a new official bond, would defendant still be bound by the present instrument for subsequent wrong conduct of the deputy? Why not? The execution of the second would not of itself operate as a substitute for the first, and release the defendant. If the law does not authorize two official bonds, covering the same period of time, and if the first covered the second term, the last and not the first would be invalid as an official bond. The agrument would lead to the result that an officer who "succeeds himself" cannot demand a new bond from a deputy whom he may desire to continue in place. The Legislature did not intend that the officer who is commanded to require of his deputy an official bond, and to "fix the amount thereof, should employ his discretion in that regard by reference to the possible employment of the deputy for an indefinite period beyond the expiration of his own present term. Experience has shown that he can hardly hope he will himself continue to be the recipient of popular favor for more than a single term.

In Virginia the term of office of the Sheriff was one year. The condition of a bond given the Sheriff by a deputy recited that he had undertaken the duties of deputy "for and during the term the Sheriff may continue in office." It was a common law undertaking and not an official bond. Carr, J., said: "The contract of the Sheriff and his deputy being *a private contract*, not regulated as to its continuance by law, might be for more than one year"—the Sheriff having been re-appointed and the deputy continuing to act as such—and added: "The question is whether the parties *intended* to be bound for only one year." No opinion was rendered in *Royster* v. *Leake* (2 Mun. 280), but it was apparently held that a bond reciting "if, therefore, the said James Vaughn (a Deputy Sheriff) shall truly and faithfully discharge, etc., *during the time of his continuance in office* of Deputy Sheriff," etc., bound the obligors for acts done by the deputy during a second term of the Sheriff. But the marginal epitome of the case is not well expressed. The bond was dated November 15, 1802, and conditioned for the faithful performance of his duty by the deputy, "during his continuance in office, *until* November Court, 1804." (See note to *Munford* v. *Rice*, 6 Mun. 81.) And the same Court, in the case just cited, held that a Deputy Sheriff's bond, conditioned for faithful performance, etc., "during his continuance in of-

fice," without specifying the length of time, was binding for the transactions of one year only. *Munford* v. *Rice* was followed in *Tyler* v. *Nelson* (14 Grat. 214).

In North Carolina, where the Sheriff's term was one year, a Sheriff was re-appointed and continued to serve for several successive years, retaining the same deputy. At the commencement of the first term, the deputy gave bond for faithful conduct, etc., "during his continuance in office." The Supreme Court said: "A deputation of necessity expires with the office on which it depends," and held that the words "during," etc., should be restricted to the first year. (*Banner* v. *McMurray*, 1 Deveraux 218.) The same thing was decided in *Thomas* v. *Sunny* (1 Jones' L. 554).

In *Curling* v. *Chalkings*, (3 Maule & S., 502), decided in 1815, it was held that a bond given by a collector appointed by the church wardens and parishioners of a certain parish covered any misconduct of the collector while he remained such. Lord Ellenborough said: "I find nothing to show that his appointment is to have an annual commencement or is to terminate at the expiration of the year." And Le Blanc, J., pointed out that the collector was *not* the deputy of any annual officer, and further, that he did not derive his appointment from any annual officer.

In *Leadly* v. *Evans*, however, decided in 1824, it was adjudged that the bond of a collector appointed by the church wardens and overseers of a parish, pursuant to an order of the vestry (the church wardens and overseers being annual officers), which was conditioned for his producing to them, "and their *successors*" a just and true account, did *not* make the sureties liable for any sum collected after the expiration of a year. (9 Moore, 102.)

Hughes v. *Miller* (5 Johns, 167), is worthy of much consideration, because the decision in that case has the sanction of the honored name of Chief Justice Kent. There the bond was given to the Sheriff by a deputy, conditioned for the due execution of the office of Deputy Sheriff *during his continuance in such office.* The Sheriff having taken on himself the office, on the 16th of September, 1801, pursuant to an appointment in August, was reappointed in March, 1803. The defendant pleaded that the Sheriff had sustained no damages in consequence of any act of defendant previous to his taking upon himself the office under his re-appointment in 1803. It was held the plea was no answer to the declaration. The Court said the deputy was equally in office as such after as before the reappointment of the plaintiff; that the deputy had no concern with the renewal of the plaintiff's

commission, so long as there was an unbroken continuation, of the plaintiff's authority.

As we have seen, this view of the question does not accord with that taken by other Courts. But it is enough to say that the bond was not an official bond, and the decision simply interprets a private contract, holding the parties intended the obligors should be bound during the time the Deputy continuously acted as such.

In the case before us the bond is an official bond, and an official bond is given for and has reference to a particular official term. (*People* v. *Aikenhead*, 5 Cal., 106; *Brown* v. *Lattimore*, 17 *id.*, 93). Here there is a recital that the plaintiff "Treasurer" has appointed *Cassebohm* Deputy, and has required of him to file a bond in a certain sum—which should be referred to the requirement commanded by Section 985 of the Political Code. A Treasurer cannot appoint a deputy to hold for a longer term than his own. If the Treasurer shall be re-elected, and the deputy continue, the retention of the latter by the former may be construed as against the Treasurer to be a reappointment, but the deputy holds his place by virtue of the implied re-appointment, and not under his original appointment. The condition of the bond before us is. "If the above bounden *William Cassebohm*, shall well and truly execute the duties of Chief Deputy," etc., which naturally and necessarily refers to the appointment he had received.

Counsel for appellant places much stress upon the language used by the Court of Chancery of South Carolina in the *Commissioners* v. *Greenwood* (1 Desaussure, 450).

There a Treasurer was re-appointed, but gave no new bond. The Court held that the bond given at the commencement of the first term did not cover his acts during his second administration. In the course of his opinion the Chancellor said: "This cause is altogether different from that of the Deputy Postmaster. He was continued in office under the original appointment by the person who first appointed him." This reference to some cause, the title of which is not given (but which had probably been mentioned by counsel in argument), is not rendered more definite by the argument, for the argument of counsel is not reported. The South Carolina case was decided in 1795, and the case referred to by the Court is *probably* an English case. If we were permitted an effort to identify the "Deputy Postmaster's case, we should hazard the conjecture that it was *Lord Arlington* v. *Merricke* (*Temp. Car.* II), which *Patterson and Williams*, in a note to the report of it, say has been con-

sidered a leading case on the subject ever since. (2 Saunders, 414.) *Lord Arlington* v. *Merricke*, was brought upon the bond of a Deputy Postmaster, the condition of which recited: "Whereas, the above-named *Lord Henry Arlington*, Postmaster-General to the King's Most Excellent Majesty, by his sufficient instrument in writing under his hand and seal bearing date, etc., has deputed the above bounden *Thomas Jenkins* to be his Deputy Postmaster of the stage of Oxen above said, to execute the said office from the 24th day of June next coming *for the term of six months following*. Now, if the said Thomas Jenkins, his deputies, servants and assigns, do and shall for and during *all the time he the said Thomas Jenkins shall continue Deputy Postmaster of said stage*, well, truly, faithfully and diligently do, execute and perform all and every the duties belonging to the said office of Deputy Postmaster of the said stage, * * * then this obligation will be void," etc.

"For the matter of law Hale (Chief Justice), said that the condition shall refer to the recital only by which the defendant was bound only for six months and not longer; and that for the reason above alleged by *Saunders*. And of such opinion was the Court; and *Tywsden* cited a case between *Horton* v. *Day*, which is entered in this Court in Mich. 22 Car. 1 Rot. 468 or 498, where in the condition of an obligation it was recited that a Sheriff had appointed the defendant bailiff of a hundred within his county, 'if therefore the defendant shall duly execute all warrants to him directed that then,' etc., it was adjudged that the words 'all warrants' should be intended to be only all warrants which were directed to the defendant *as bailiff of the said hundred*, and not other warrants. And so here the words 'during all the time' shall be intended but only during the six months recited in the condition."

"The reason above alleged by *Saunders*" is found on the preceding page, where it appears *Saunders*, as counsel for defendant, argued: "The defendant by the intention of the condition was not to be responsible for *Jenkins* for any longer time than for the said six months, although the words are that *Jenkins during all the time that he shall continue Deputy Postmaster* indefinitely *shall observe and perform*, etc., yet this time, which is indefinite in itself, ought to be construed only for the said six months for which the condition recites that *Jenkins* was appointed to be Deputy Postmaster, and the rather because *Jenkins* cannot continue Deputy Postmaster for any longer time than for the said six months, unless he be appointed anew, and have a new deputation for

a longer time. And he said that by the construction which the plaintiff's counsel would put upon it the defendant would be tricked; for it appears that the defendant intended to be bound for *Jenkins* for the due execution of the said office only for six months; but the plaintiff would have the defendant bound during the whole life of *Jenkins*, which is unreasonable to suppose."

If *Lord Arlington* v. *Merricke* is the case referred to by the South Carolina Chancellor, it certainly, as he remarked, differs from the case before him. It does not, however, sustain the position of appellant in the case at bar.

The cases in which bonds given to individuals or private corporations have been construed, are not authoritative adjudications with reference to the question before us. Such matters are subject of private contract by which the parties may bind themselves in any manner or to any extent, not violative of public policy or positive statue.

The first and second counts do not state a cause of action because they do not allege a defalcation or misappropriation by *Cassebohm* during the period for which alone the obligors, who executed the instrument sued on, became his sureties.

The judgment of the Superior Court is reversed. The cause is remanded with direction to the Court below to set aside the order sustaining the defendant's demurrers, and to enter an order or orders overruling defendant's demurrer to the complaint as a whole, and overruling the demurrer to the third count of the complaint, and sustaining the demurrer to the first and second counts thereof.

We concur: Sharpstein, J., Myrick, J., Thornton, J., Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed September 8, 1883.]

No. 7758.

FITCH *v.* CORBETT ET AL.

THE COURT—(THORNTON, MYRICK, and SHARPSTEIN, J.J.):

FRAUDULENT CONVEYANCE.

This action was instituted to set aside a conveyance alleged to have been executed to hinder, delay and defraud creditors, and especially one E. M. Heistand, the plaintiff's

assignor, of her rights as creditor. Actual fraud is averred and found as a fact, and the finding is sustained by the evidence. It is argued that because Mrs. Heistand knew of the fraudulent conveyance that neither she nor her assignee can avoid it. We cannot see that there is any reason in this position, for if she was aware of the conveyance and knew its fraudulent character, it was still void, and she has done nothing by which her right to proceed to annul it for fraud has been waived or given up. If she knew the character of the conveyance she knew that it was fraudulent, and by consequence void. (*Carter* v. *Castleberry*, 5 Ala., N. S. 279.) Nor did she waive any right by settling with Corbett for $7,500. How the settlement of the 3d of July, 1878, purged the fraud we cannot conceive.

The counsel for appellants is mistaken in viewing this case as a mere voluntary conveyance to the wife without actual fraud, and as only constructively fraudulent against existing creditors. It is as we have said above, a case of actual fraud alleged, established and found.

We have examined the errors of law assigned and find none of them maintainable.

Judgment and order affirmed.

IN BANK.

[Filed October 26, 1883.]

No. 10,888.

EX PARTE FLOOD ON HABEAS CORPUS.

HOUSE OF CORRECTION—SENTENCE. The Superior Court of San Francisco has jurisdiction to sentence a defendant convicted of grand larceny to the House of Correction, instead of to the State Prison.

ID. The Act in relation to the House of Correction of the city and county of San Francisco, has not been repealed. (Stats. 1877–8, p. 953.)

Habeas Corpus.

McKEE, J., delivered the opinion of the Court:

In the Superior Court of the city and county of San Francisco, the petitioner, having been convicted of the crime of grand larceny, was sentenced to imprisonment in the House of Correction of said city and county for the term of three years. The sentence was imposed under the provisions of a statute passed April 1, 1877, entitled "An Act in relation to the House of Correction of the city and county of San Francisco." (Stats. 1877–78, p. 953.) By

Section 3 of the Act, it was provided that "All persons appearing for sentence in the Police Judge's Court, the City Criminal Court, or the Municipal Criminal Court of the city and county of San Francisco, who might be sentenced to imprisonment in the County Jail or in the State Prison may, instead thereof, be sentenced to imprisonment in the House of Correction in said city and county, subject, however, to the provisions of Section 4; and no person shall be sentenced to imprisonment in the House of Correction except under the provisions of this Act."

All the Courts enumerated in the above section of this Act, except the Police Judge's Court, were abolished by the Constitution of 1879 (Sub. 3, Art. XXII, Const.); and the cases in those Courts, together with the records, books and papers appertaining to them, were, by command of the Constitution, transferred on January 1, 1880, to the Superior Court of the city and county (Art. VII, Sec. 5, *id.*); and by Sec. 3 of an Act to transfer the records, papers and business of the Courts existing on the 31st of December, 1879, to the present existing Courts, passed February 4, 1880, the provisions of the Constitution in that regard were carried into effect. When transferred, the Superior Court was authorized "to exercise jurisdiction over such cases, records, books and papers as if they had been, in the first instance, commenced, filed or lodged therein."

The case in hand, however, was not one of that class of cases. It had not been commenced and was not pending in any of the abolished Courts on or before December 31, 1879; and there were no records, papers, or books appertaining to it, transferable or transferred to the Superior Court. As a transferred case, the Superior Court had therefore no jurisdiction over it. It was commenced in the Superior Court and prosecuted to the conviction of the defendant under the original jurisdiction conferred upon the Court "over all criminal cases amounting to felony and cases of misdemeanor not otherwise provided for" (Sec. 5, Art. VI, Const.); and under the provisions of the Penal Code applicable to the crime, of which conviction was had, to which was annexed as a punishment, imprisonment in the State Prison of not less than one nor more than ten years. (Sec. 489, Pen. Code.) But if the case had been within any one of the Courts which were abolished by the Constitution, that Court would have been authorized, by the law of 1877, to punish the petitioner for the crime of which he stood convicted, by imprisonment in the House of Correction instead of by imprisonment in the State Prison. The abolition of those

Courts did not wipe out the laws which were applicable to them, nor has the law of 1877 been repealed. On the contrary, the framers of the Constitution retained the law of 1877 (Section 1, Art. XXII, Const.), and made it applicable to the Superior Court, which they created as the successor of the Courts that had been abolished (Secs. 2 and 11, Art. XXII); and it results, as the law of 1877 was applicable to the Superior Court, and the circumstances of the case brought the case itself within the provisions of the law, that the Court had jurisdiction to sentence the defendant in the case to the House of Correction instead of to the State Prison. The judgment, under which the petitioner has been committed, is therefore valid, and the petitioner is lawfully held in custody.

Writ dismissed and petitioner remanded.

We concur: Thornton, J., Myrick, J., Sharpstein, J., McKinstry, J., Ross, J.

IN BANK.

[Filed June 29, 1883.]

No. 10,824.

PEOPLE, RESPONDENT *v.* BURNS, APPELLANT.

CRIMINAL LAW—INFORMATION—BURGLARY—RAPE. The information in this case held sufficient.

ID.—CHARGE. Where the Court in its charge read a portion of the statute inapplicable to the case, it is not grounds for a reversal, if the substantial rights of the defendants were not affected.

Appeal from Superior Court, Colusa County.

Attorney-General for respondent.
Carr & Hatch for appellant.

MYRICK J., delivered the opinion of the Court:

The defendant was accused by the District Attorney of the crime of burglary, and the information charged that the accused committed the crime as follows: That he had feloniously and burglariously entered a certain house of one ——— [naming a woman], in which said house she, the said [woman named] did then and there reside, with intent then and there to commit a rape upon the said [woman named].

Section 261, Penal Code, defines the crime of rape as the act therein named accomplished under either of six sets of circumstances therein set forth. Objection was made to the

information in that it did not state under which set of circumstances specified in this section the act was intended by the defendant to be accomplished. We think the informatiod was sufficient. (*People* v. *Shaber*, 32 Cal. 36; *People* v. *Girr*, 53 Cal. 629.)

In the charge to the jury the Court read subdivisions 3 and 4 of Section 261, above mentioned, as applicable to the case on trial. Subdivision 3 and the first part of subdivision 4 did relate to the case; but there was no testimony to which the latter part of subdivision 4 would be applicable, in that there was no testimony that any intoxicating, narcotic or anæsthetic substance was administered or attempted to be administered. The defendant alleges that it was error to read the latter part of this subdivision. The entry into the house in the night time and the use of force and threats in endeavoring to accomplish the act were in evidence; and upon that evidence the jury was justified in convicting the defendant. It is not apparent that the reading of the clause objected to affected any substantial right of the defendant. (Section 1258, Penal Code.)

Judgment and order affirmed.

We concur: Ross, J., McKee, J., Sharpstein, J., Thornton, J.

DEPARTMENT NO. 1.

[Filed June 14, 1883.]

No. 8802.

HOLMES, APPELLANT, *v.* MCCLEARY, RESPONDENT.

APPEAL—NEW TRIAL. An *order* denying a motion for new trial is not appealable, and the statement cannot be considered.

Appeal from Superior Court, San Diago Cnunty.

J. R. Jones for appellant.

M. A. Luce for respondent.

By the COURT:

The notice of the appeal is as follows:

"You will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State from the judgment or order denying plaintiff's motion for an order on Joseph Coyne, Sheriff, directing him to apply the proceeds of the property herein attached by him to the satisfaction of the plaintiff's judgment and costs therein, and entered in the said Superior Court, on the 30th day

of October, 1882, in favor of said Joseph Coyne, Sheriff, and against said plaintiff, and from the whole thereof. And also from the order denying said plaintiff's motion for a new trial, made and entered in the minutes of said Court the 27th day of November, 1882."

The order of the 27th of November was not appealable, and the "statement" on motion for new trial cannot be considered here.

There remain only the notice of motion for, and the order of October 30th, from which no error appears.

Order affirmed.

IN BANK.

[Filed October 26, 1883.]

No. 10,856.

PEOPLE, RESPONDENT, *v.* LANGTREE, APPELLANT.

HUSBAND AND WIFE—WITNESS—EVIDENCE—PARTIES. Section 1322 of the Penal Code limits the incompetency of a husband or wife to testify in criminal actions or proceedings for or against each other to cases in which one or both are *parties*.

ID. Where, as to criminal evidence, the provisions of the C. C. P. and Penal Code differ, those of the latter prevail. (1102 Pen. C.)

ID. On the cross-examination of B, who was charged in a separate information with the same burglary for which defendant was on trial, counsel for defendant endeavored by appropriate questions to elicit from the witness whether he expected, in consequence of his becoming a witness for the prosecution, that he would be favored, be more leniently dealt by when his own case should come up. To several of these questions the answers were evasive. *Held*, the Court should have compelled a direct answer, and not sustained an objection to a question put by defendant's counsel as to his expectations.

Appeal from Superior Court, San Francisco County.

Attorney-General for respondent.

D. Louderback for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

It does not appear that Mrs. Brandon, who was called as a witness by the defendant, objected to testifying to all that she knew in regard to the burglary for which he was on trial. Nor does it appear that her husband objected to her testifying. His counsel, Mr. Carson, stated that, from the commencement of the trial, he had interposed no objection whatever. On being informed by the Court that at that stage he had a right to interfere, if he so elected, Mr. Carson replied: "I would much prefer not to have Mrs. Brandon examined." She was a competent witness, and the only question which

could possibly arise was whether she could be compelled to testify to any fact which might implicate her husband in the offense with which the defendant was charged. And such evidently was the opinion of the Court, which held that the witness might "be examined on any matters touching the case" except those relating to her husband;" but would "not permit her to testify as to any matters in which her husband was implicated in the crime for which the defendant was on trial." It is of this that the defendant complains. There was a separate information pending in the Court, in which the husband of the witness was charged with the same burglary for which the defendant was on trial. But said husband was not in any sense a party to the action or proceeding in which his wife was called as a witness. If he had been, his wife could not have been a witness for or against him, unless both he and she consented thereto. (Penal Code, Sec. 1,323, C. C. P., Sec. 1881). And it is claimed by the Attorney-General, "that although the husband of the witness was not a party to the proceedings then before the Court, the fact that he was under information for the same offense, made his connection with those proceedings such that the testimony of his wife, implicating him in the crime, would have been a breach of confidence repugnant to the policy and intention of the law and a manifest violation of its meaning." In support of this he cites Section 1,881, C. C. P., which reads as follows: "A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband without his consent; nor can either during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage, but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

This is the provision of the Code on the subject, and it must prevail: "All statutes, laws and rules heretofore in force in this State, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated." (C. C. P., Sec. 18.)

"A wife cannot be examined, for or against her husband without his consent." But when may she be said to be examined *for or against* him? If examined in an action or proceeding to which he was a party, she would undoubtedly be examined for or against him. Any witness examined in an action or proceeding is examined for one party and against the other therein. No witness is said to be examined for or against

any one not a party to the action or proceeding in which such witness is called to testify. And the testimony of a witness is not evidence, for or against any one not a party to the action or proceeding in which such testimony is given. If the husband of this witness had been a party to the action on trial she could not have been examined at all without his consent. She could not then have been examined in regard to any matters whatever, because if relevant her testimony would be, in some degree, for or against him. Not being a party to the action her testimony could not be used for or against him.

Thus far we have considered the provision of the Code of Civil Procedure as if it were the only one relating to the subject. But it is not. There is a provision of the Penal Code on the same subject. It is as follows: "Except with the consent of both, or in case of criminal violence upon one by the other, neither husband nor wife is a competent witness *for* or *against* the other in a criminal action or proceeding to which one or both are parties." (Penal Code, Sec. 1322.) This is the latest enactment on the subject, and relates exclusively to criminal actions or proceedings. It limits the incompetency of a husband or wife to testify in criminal actions or proceedings for or against each other to cases in which one or both are parties. By Section 1102 Penal Code, the rules of evidence in civil actions are made applicable also to criminal actions, except as otherwise provided in said Penal Code. Therefore if there be any repugnancy between the provisions of the two Codes on this subject, that of the Penal Code must prevail. We think upon a fair construction both mean the same thing, although the Penal Code is more explicit than the other.

On this as on nearly every other subject to which the Codes relate, they are simply declaratory of what the law would be if there were no Codes. (*State* v. *Bridgman*, 49 Vt. 206; *Comm.* v. *Reid*, 8 Phil. Rep. 385; *Same* v. *Patterson*, 8 *id.* 609; *State* v. *Briggs*, 9 R. I. 361; *Royal Ins. Co.* v. *Noble*, 5 Abb. Pr. Rep. 55; *Rex* v. *Inhabitants, etc.*, 6 M. and S. 194; *Same* v. *Inhabitants of Buthwick*, 2 B. and A. 646; *Regina* v. *Halliday*, 8 Cox's C. C. 298; *Hammon* v. *Dickinson*, 5 Bing. 184; *Regina* v. *Williams*, 8 C. and P. N. P. 284; *Highbee* v. *McMillan*, 18 Kan. 136; 1 Greenleaf Ev. 342; Roscoe's Cr. Ev. 148; 1 Wharton Ev. 425; Wharton's Cr. Ev. 396, 402; Schouler on Husband and Wife, 85.)

"On the whole" says Schouler, "the prevailing tendency of late years in both England and America, is to regard the domestic confidence or the ties of a spouse as of little con-

sequence compared with the public convenience of extending the means of ascertaining the truth in all cases; such facilities being increased, it is believed, by hearing what each one has to say, and then making due allowance for circumstances affecting each one's credibility." (Schouler on Husband and Wife, 85.)

On the cross-examination of Patrick Brandon, who as before stated, was charged in a separate information, with the same burglary for which the defendant was on trial, the counsel for defendant endeavored by appropriate questions to elicit from the witness whether he expected, in consequence of his becoming a witness for the prosecution, that he would be favored or more leniently dealt by when his own case should come up. To several questions of this character his answers were evasive. The Court seeing this, should have compelled the witness to give a direct answer. Instead of doing so, however, the Court sustained an objection of the prosecution to a question put by the defendant's counsel to the witness as to his expectations. These are the only material errors which the record discloses.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J., Thornton, J., Myrick, J., McKee, J., Ross, J.

IN BANK.

[Filed October 26, 1883.]

No. 10,848.

THE PEOPLE, RESPONDENT, *v.* SCHMIDT, APPELLANT.

JEOPARDY—HOMICIDE—APPEAL—VERDICT. A former information was, on appeal by defendant from a judgment of conviction of murder in the first degree, decided to be fatally defective, and the cause was "remanded for further proceedings." *Held*, Such proceedings constituted no bar to a prosecution upon another information filed after remanding the cause.

ID. A new trial upon a fatally defective information would be a vain thing, and the cause was, therefore, properly remanded for further proceedings.

ID. Where a verdict of guilty is set aside on motion of defendant, there is no bar to a subsequent prosecution for the same crime of which he was found guilty.

ID. The dismissal of the former action by the Superior Court did not constitute a bar to another prosecution for the same homicide. (1387 Penal Code.)

DEMURRER—MOTION. The grounds enumerated in Section 995, Penal Code, are the only grounds upon which an indictment or information may be set aside on motion; and those enumerated in Section 1004 *id.* are the only grounds upon which a demurrer to an indictment or information may be made.

Appeal from Superior Court, Butte County.

Attorney-General for respondent.
Gray & Sexton and *J. W. Turner* for appellant.

McKEE, J., delivered the opinion of the Court:

The appeal in this case is from a judgment of death pronounced against the defendant upon a conviction for murder in the first degree, upon an information filed March 13, 1883, in the Superior Court of Butte county, and also from an order denying a motion for new trial.

It is stipulated, in the record of the case, that the verdict was warranted by the evidence, except on the issues of "once in jeopardy" and "a former conviction;" also, that all the proceedings at the trial were regular, with the exception of the errors which are specified.

The specifications of error are, that the Court refused to set aside the information upon motion, overruled a demurrer to the information; and, after conviction refused to arrest the jndgment, and denied defendant's motion for a new trial.

The grounds enumerated in Section 995 of the Penal Code, are the only grounds upon which an indictment or information may be set aside on motion (*People* v. *Shotwell*, 46 Cal. 141); and those enumerated in Section 1004 *id.*, are the only grounds upon which a demurrer to an indictment or information may be made. Neither the motion to set aside the information, nor the demurrer to the information was based upon any of the grounds enumerated in these sections, except that one of the grounds of the motion was that the defendant had not been legally committed by a magistrate before the filing of the information; and one of the grounds of the demurrer was that the information did not conform to the requirements of Sections 950, 51 and 52 of the Penal Code. But the information substantially conformed to those sections; and the record of the case shows that the defendant had been legally committed by a magistrate pursuant to Section 872 *id.*, before the information was filed; there was, therefore, no error in denying the motion to set aside, nor in overruling the demurrer. Nor was there any error in denying the motion in arrest of judgment, because that motion was based upon the ground specified in the demurrer, which, as we have seen, was properly overruled.

But the principal question at issue, urged by the appellant, and argued on the hearing, arises out of the specification of error that the verdicts upon the pleas of "once in

jeopardy" and "a former conviction" were contrary to the law and the evidence.

At the trial of the issues raised by these pleas, the defendant proved that he had been tried and found guilty of murder in the first degree for the same homicide, upon an information filed in the Superior Court of Butte County, June 29, 1882. But it was also proved that the information upon which he was convicted, contained no allegation that the homicide had been committed with "malice aforethought," nor were any words of equivalent import used in it to describe the crime; that information was, therefore, fatally defective. Nevertheless, judgment of death was pronounced against the defendant; but he appealed from the judgment to this Court, and obtained a reversal of the judgment, because of the defective information upon which the conviction was had, and the Court "remanded the cause for further proceedings." (*People* v. *Schmidt*, X Pac. C. L. J., 756.) Yet the defendant contends that that conviction and judgment, although they have been set aside at his own instance, constitute a bar to further prosecution for the same crime, upon the ground that he has been once in jeopardy. The mere statement of the proposition would seem to be its own refutation; for the judgment having been vacated and the conviction set aside at the instance of the defendant himself, there was no existing judgment or conviction which could be availed of as a bar to the action. No case can be found where the verdict of guilty having been set aside on motion of the prisoner it has been held a bar to another trial. (*U. S.* v. *Kean*, 1 McLean, 435.)

But it is argued that on reversing the judgment this Court did not remand the case for a new trial, and that, in consequence of the failure to order a new trial, the defendant was entitled to be discharged. A new trial upon a fatally defective information would be a vain thing; the case was therefore remanded for further proceedings. That did not entitle the defendant to be discharged from custody if the law authorized his detention. The legal effect of the remanding order was to remit the defendant to his original position upon his plea of not guilty to the information on file, just as though a trial had never been had, and upon the going down of the remittitur to the Superior Court, that Court had jurisdiction to proceed in the case before it, in any way authorized by the criminal law.

Now a Superior Court in which a criminal action is pending has authority to dismiss the action, and to direct the resubmission or re-examination of the charge, and, in the

meantime, detain the defendant in custody for his appearance to answer a new indictment or information in the following cases:

1. Where, in the trial of a cause it appears that the facts as charged do not constitute an offense punishable by law, and, in the opinion of the Court, a new indictment or information can be framed upon in which the defendant can be legally convicted. (Sec. 1,117, Pen. C.) 2. Where after a verdict of acquittal has been given because of a variance between the pleading and proof which may be obviated by a new indictment or information. (Sec. 1,165, *id.*) 3. When, after an order in arrest of judgment it appears to the Court from the evidence given on the trial, there is reason to believe the defendant guilty, and a new indictment or information can be framed upon which he may be convicted. (Sec. 1,188, *id.*) 4. Where, in the judgment of the Court the dismissal of the action would be "in furtherance of justice." Upon that ground the Court is authorized of its motion, or upon the application of the District Attorney, to order the dismissal of an action or indictment. (Sec. 1,385, *id.*)

Under the provisions of the last cited section of the Penal Code proceedings were taken by the Superior Court against the defendant. Upon due notice given, the District Attorney moved the Court to dismiss the action and retain the defendant in custody for a re-examination upon a new charge for the same homicide. The defendant and his counsel were present at the hearing of motion and made no objection; and the Court ordered the dismissal of the action upon the ground stated in Section 1,385 *supra*. After the entry of the order a new charge of murder was made against the defendant, upon which he was regularly examined before a magistrate and committed to answer.

The dismissal of the former action did not constitute a bar to another prosecution for the same homicide. (Sec. 1,387, Penal Code.) Nor did the proceedings after the dismissal and before the filing of the second information have that effect; nor could the former conviction upon the first information be availed of for that purpose, because it had been set aside on the motion of the defendant himself. Having been set aside, at the instance of the defendant, upon the ground that the information was insufficient in form and substance to sustain the conviction, it cannot be legally said that the defendant had been already tried and convicted upon an information valid and sufficient to sustain a conviction for the same offense of which he has been since convic-

ted upon another information. He has therefore not been tried twice for the same offense.

The People v. *Gilmore* (4 Cal. 376) is not a parallel case to the one in hand. In that case the defendant was indicted for murder and convicted of manslaughter. On his own motion the verdict was set aside, and he was put on trial a second time upon the same indictment and was convicted of murder; but the Supreme Court set aside the conviction upon the ground that the former conviction for manslaughter was an acquittal for murder, and the defendant could not be retired for the crime of which he had been acquitted, although the conviction for the less offense was set aside on his own motion. That decision was followed in the case of the *People* v. *Backus* (5 Cal. 370), and was quoted approvingly by Justice Sawyer in *People* v. *Apgar*, 35 *id.* 389, but neither Justice Sanderson nor Justice Rhodes expressed an opinion—both concurring in the judgment in the case upon other grounds.

Whether those cases would be considered as binding upon this Court under the provisions of the Penal Code, it is not necessary now to decide; for in the case in hand there has been no acquittal of a greater offense by a conviction for a lesser offense included within the greater, and there has been no retrial upon the same information. There was a conviction for the highest offense under an information, which was adjudged insufficient to sustain the conviction; there was, therefore, no implied verdict of acquittal available for any purpose, and as the conviction was set aside on the defendant's motion, there is no existing verdict of any sort which can be availed of as a bar to a further prosecution for the same crime. Therefore, the defendant has not been in jeopardy within the meaning of the Constitution; and there was no error in denying his motion for a new trial. We find no error in the record.

Judgment and order affirmed.

We concur: Sharpstein, J., McKinstry, J., Myrick, J., Ross, J., Thornton, J.

DEPARTMENT No. 2.

[Filed October 11, 1883.]

No. 9204.

IN THE MATTER OF THE ESTATE OF McKINNON, DECEASED.

ESTATE—PUBLIC ADMINISTRATOR. A Public Administrator does not waive his right to letters as such because he had first applied for letters as a creditor of the estate.

Appeal from Superior Court, San Diego County.

Conklin & Hunsaker for Appellant.

MYRICK, J., delivered the opinion of the Court:

One Stockton presented a petition as creditor for letters of administration: Ubach and Keating also presented a petition as creditors; and thereafter, said Stockton presented his petition as Public Administrator. After due notice given on each, all the petitions came on for hearing, when Stockton withdrew his petition as creditor. Thereupon the Court made the following order, which order is appealed from:

"At this time the Court denies the petition of T. C. Stockton for letters of administration herein as Public Administrator, and grants the petition of A. D. Ubach and Michael Keating, asking that letters of administration be granted to A. D. Ubach and Michael Keating, the Court holding that said Stockton waived his right as Public Administrator to have letters herein when he applied first for letters as a creditor, and that he was thereby estopped from a right to make the second application as Public Administrator, and he having dismissed his application only at the hearing, and petitioners Ubach and Keating having filed their petitions for letters after Stockton's petition for letters as a creditor, but before his petition for letters as Public Administrator was filed.

"And thereupon the Court made its order in the usual form directing that letters of administration upon the estate of said deceased be issued to said Ubach and Keating, upon their taking the oath and filing a bond according to law, in the sum of $3,500."

In withdrawing the petition as a creditor, and in standing on the other petition, there was no waiver of the latter, nor was Stockton estopped from urging his claim to letters as Public Administrator. As such officer he was entitled to letters in preference to creditors. (Section 1365, C. C. P.)

The order is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

We concur: Sharpstein, J., Thornton, J.

New Law Publication.

IMPORTANT TO STUDENTS.

We have just received a pamphlet containing a list of the questions submitted to the graduating classes of the Law School at Cincinnati, from 1879 to date.

Published by Wil. H. Scott, 64 West Third Street, Cincinnati. Price, 50 cents.

Abstracts of Recent Decisions.

ACTION ON ATTACHMENT BOND—ACTION FOR MALICIOUSLY SUING OUT ATTACHMENT. The bond required upon suing out an attachment is conditioned that the plaintiff will pay to the defendant his costs and damages sustained by reason of the attachment, if the defendant recovers judgment. An action upon this bond is *ex contractu*, and the damages are limited to injury sustained by being deprived of the use of the property, or by its loss, destruction or deterioration, together with costs of suit. For all other injuries sustained, the defendant must sue the plaintiff alone in the case. This action is *ex delicto*. Both actions may be brought. The parties, the proof, the damages and the nature of the action are different. (*Hall* v. *Forman*, Court of Appeals of Ky., 2 Ky. L. J. & Rep. 140.)

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT. 1. A railroad company is liable in an action on behalf of its fireman killed by the washing-out of a culvert, the culvert being in an improper condition resulting from negligence and carelessness of its bridge-builder and road-master. 2. The negligence of the bridge-builder and road-master, in caring for the culvert, in law was the negligence of the defendant; and notice to the former of a defective construction was notice to the latter; hence, it is not a question of whether the servant whose negligence caused the injury and the servant injured were fellow-servants; nor, whether the former was ordinarily skillful; nor, whether the defendant was negligent in employing them. *Davis* v. *Central Vt. R. Co.*, S. C. Vt., October Term, 1882; Reporters' Advance Sheets.

FIRE INSURANCE — PROOF OF LOSS — WAIVER — STATEMENT OF OWNERSHIP. As a rule the law does not require vain things, and where technical proof could but restate information of a total loss, of which an insurance company was already fully advised, to insist upon such technical proofs would be to oppose the barest technicality as a bar to the assured's right to recover a strictly honest claim. The waiver of proofs of loss, required in a policy, may be inferred by any act of the insurer evincing a recognition of liability or a denial of obligation exclusively for other reasons. If the equitable title to a property is in the assured, it is equivalent to a fee in making good the statement of "ownership" in the application for the insurance. *Pennsylvania Fire Ins. Co.* v. *Dougherty*, S. C. Pa., April 16, 1883; 40 Leg. Int. 334.

Pacific Coast Law Journal.

Vol. XII. November 3, 1883. No. 11.

Current Topics.

APPEAL FROM A JUSTICE OF THE PEACE IN ACTIONS OF FORCIBLE ENTRY AND DETAINER.

Judge Dunn, of the Justices' Court, has recently held that an appeal from a Justice's Court in an action of Forcible Entry and Detainer is to the Supreme, and not to the Superior Court. He bases his opinion upon Sec. 4, Art. VI of the Constitution which provides that the Supreme Court shall have appellate jurisdiction in cases of forcible entry and detainer, upon Section 11, Art. VI which provides that Justices of the Peace shall have concurrent jurisdiction with the Superior Court in certain cases of forcible entry and detainer, and upon Section 964 of the Code of Civil Procedure which reads: "the foregoing section does not apply in cases appealed from Justices', Police, or other inferior Courts, *except cases of forcible entry and detainer, etc.*" Section 963, "the foregoing section," prescribes when an appeal may be taken to the Supreme Court. It would therefore seem that the appeal, in such cases, is by the clear letter of the law, to the Supreme, and not to the Superior Court.

COMMUNITY PROPERTY, (Before the Code).

Our whole system by which the rights of property between husband and wife are regulated and determined, is borrowed from the Civil and Spanish law, and we must look to these sources for the reasons which induced its adoption, and the rules and principles which govern its operation and effect. 17 Cal. 537.

Under the Spanish and Mexican law, property acquired by the husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community, whilst property acquired by either of them by lucrative title only, constituted the separate property of the party making the acquisition. The fruits, profits, and increase of the separate property, also, belonged to the community. Lucrative title was created by donation, devise, or descent. By onerous title was meant that which was created by valuable consideration. 13 Cal. 471; 26 Cal. 567.

By the Mexican law the husband was entitled to the use, control, and disposition of the common property during the coverture. Upon the dissolution of the matrimonial union by the death of the wife the husband might still continue in possession as surviving partner, and might sell or dispose of it in liquidation of the community debts. The children of the spouses, on the death of the wife succeeded to the title of their mother, subject to the payment of debts. They became tenants-in-common with their father. 18 Cal. 74.

In *Panaud* v. *Jones*, 1 Cal. 512, and *Scott* v. *Ward*, 13 Cal. 471, it was held that under the Mexican law no estate in such property vested in the children on the decease of the wife, but that they had only a contingent and defeasible interest in it, which became perfect not till the death of the husband, and then only after the payment of his debts.

Upon the death of the husband the wife acquired full property in one half of the community property. 13 Cal. 470.

The first statutory enactment of the California Legislature was the Act of April 17, 1850.

By this Act "all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be community property." This Statute did not seem to provide for a gift to the husband and wife jointly. With this exception, there does not seem to have been any substantial difference between it and the Mexican law. 13 Cal. 472.

All property acquired during marriage was presumed to be common property. The fact that the deed or bill of sale was taken in the name of the wife, a money consideration being ex-

pressed, did not rebut this presumption. The burden of proof was on the party claiming it as separate property to show it by very clear testimony. 12 Cal. 124, 247; 13 Cal. 471; 17 Cal. 578; 21 Cal. 81, 346; 23 Cal. 237; 28 Cal. 41; 31 Cal. 440; 38 Cal. 230.

The rents, issues and profits of the separate estate were also, as in the Mexican law, deemed common property. The Constitution (Art. XI, Sec. 14) provided that all property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, should be separate property.

By the Act of 1850 the husband had the management and control of the common property, with the like power of disposition, as of his separate estate. The title was in him. 15 Cal. 312; 12 Cal. 124; 26 Cal. 567; 17 Cal. 539. A mortgage by him alone was valid. 33 Cal. 668.

The Supreme Court held that the Legislature had not the constitutional power to say that the fruits of the property of the wife shall be taken from her, and given to the husband or his creditors, and declared that the rents, issues and profits of her separate estate was not common property. 15 Cal. 324; 24 Cal. 98.

The husband could not, however, during the existence of the marriage, make a voluntary disposition of the common property with a view to injure his wife. 12 Cal. 124; 26 Cal. 568.

The husband, while free from debts, might make a gift to his wife of common property, and it would become her separate estate. 31 Cal. 447; 42 Cal. 361.

A gift of a portion of the common property to a stranger was not void *per se*. In the absence of any fraudulent intent to defeat the claims of the wife, the husband might make a voluntary disposition of a portion of the common property, reasonable in reference to the whole amount, 43 Cal. 581.

The husband could not dispose of the common property by will. A testamentary disposition could only take effect after his death, whereas the wife's interest became absolute at his death. 5 Cal. 259, 8 Cal. 510, 13 Cal. 479, 29 Cal. 347, 42 Cal. 211.

Section 11 of the Act of 1850 provided that, upon the dissolution of the community by the death of either husband or wife, one-half of the common property should go to the survivor, and the other half to the descendants of the deceased husband or wife, or if there were no such descendants, the whole went to

the survivor, subject, in either case, to the payment of the debts of the deceased.

This is a deviation from the Spanish law, unless the words "debts of the deceased" shall be construed as including all debts contracted for the community, whether by the deceased or the survivor. 1 Cal. 514.

The Supreme Court afterwards adopted this construction as a just and reasonable construction of the section, 17 Cal. 537, (the Court could not, of course, have meant that the common property was liable for debts contracted by the wife, because she could contract none).

Upon the dissolution of the community by the death of the husband the whole common property was liable for the payment of his debts. 17 Cal. 538, 46 Cal. 234. The remainder was divided between his descendants and his widow. 29 Cal. 347.

In 1861 (Stat. 1861, 310) this was amended so that on the death of the wife the husband obtained all of the common property; and, upon the death of the husband, there being no descendants of the husband, one half was subject to his testamentary disposition, or, in the absence of such disposition was distributed as his separate estate, while the other half became the property of the wife. If there were such descendants, they obtained one half of the common property. In both cases it was subject to the payment of his debts.

In 1864 (Stats. 1863–4, 362) this Section was amended so as to read as the Code now provides (Sec. 1402 C. C.).

The term "descendants" here means "children, grandchildren and their children to the remotest degree." 28 Cal. 232.

As long as the community lasts, the interest of the wife is as a mere expectancy, like that which an heir possesses in the estate of an ancestor, and possesses none of the attributes of an estate, either at law or equity. 15 Cal. 308; 17 Cal. 539, 541; 39 Cal. 164.

Upon the dissolution of the community by the death of the wife, her descendants succeeded to the interest to which she would otherwise be entitled, not as a portion of her estate, but because it was vested in them by statute. But they took it liable to be absorbed in the payment of debts. 17 Cal. 541; 50 Cal. 633. They became tenants-in-common with their father. 44 Cal. 229, 496.

The Act of 1850 also provided that, upon the dissolution of the community by the decree of a Court of competent jurisdiction, the common property should be equally divided between the husband and wife. 3 Cal. 312; 32 Cal. 493; 39 Cal. 157.

The husband and wife thereupon became tenants in common of the community property. 31 Cal. 29.

The pending of a suit for divorce did not interrupt the husband's powers in relation to the community property. 43 Cal. 581.

Although our laws in regard to the property rights of husband and wife was derived from the Spanish law, yet our whole system of law is based upon the common law of England, and this common law prevails except where it is changed by statute.

We have, by statute, changed the common law in regard to the debts of the wife contracted *dum sola*, in two respects, viz., her separate estate is made liable, and his (the husband's) separate estate is exempted. Otherwise his liability remains as at common law, and, therefore, the common property, the title to which is in him, is also liable for her anti-nuptial debts. 15 Cal. 302; 35 Cal. 214.

COMMUNITY PROPERTY, (UNDER THE CODE).

The code defines common property as all other (meaning other than separate) property acquired after marriage by either husband or wife, or both (C. C. 164.) This makes no change from the Act of 1850, unless in the additional words "*or both.*" The rents, issues, and profits of separate property are declared to be separate property (C. C. 162).

The husband has the like power and control of the common property as under the Act of 1850 (C. C. 172).

In *Greiner* v. *Greiner*, 8 Pac. C. L. J. 122, the Court held that the wife could not, *during the coverture*, bring any action to set aside any transfer of the community property, though made with intent to defraud the community, but that she must wait until the dissolution of the community.

The Code provides that the common property shall not be liable for the contracts of the wife unless secured by a pledge or mortgage thereof executed by the husband (C. C. 167); 11 Pac. C. L. J. 362.

The earnings of the wife, though living with the husband, are relieved from liability for the debts of the husband. They cer-

tainly are, however, common property. Her earnings, while living separate from her husband, are her separate property (C. C. 169). This is a peculiar anomaly. The wife's earnings, while living with her husband, are common property, and, as such, are subject to the control and disposition of the husband, and yet he can not pay his debts with them.

Upon the dissolution of the community by the decree of a court of competent jurisdiction the community property is divided equally between the husband and wife, except when the decree is rendered on the ground of adultery or extreme cruelty, in which cases the Court divides it as it deems best (C. C. 146) 47 Cal. 64; 60 Cal. 580.

Upon the dissolution of the community by the death of the wife, the entire community property belongs to the surviving husband (C. C. 1401) 10 Pac. C. L. J. 752; 11 Pac. C. L. J. 481.

Upon the dissolution of the community by the death of the husband, one-half goes to the wife, and the other half (if there is no will) goes to his descendants; but if there are no descendants, it is subject to distribution in the same manner as is his separate estate. It is, however, first subject to his debts, the family allowance and expenses of administration (C. C. 1402).

The descendants no longer inherit on the death of the wife, but the husband takes it entire.

When a homestead was carved out of the common property, the property remained such when the homestead terminated. 14 Cal. 474; 49 Cal. 201; 8 Pac. C. L. J. 961.

Under the Code the homestead, when carved out of the community property, vests, on the death of either spouse, in the survivor (C. C. 1265).

Upon the dissolution of the community by the decree of a Court of competent jurisdiction, the Court may assign the homestead, when selected from the common property, to the innocent party absolutely, or cause it to be sold and the proceeds divided (C. C. 140).

With the exception of these changes the law of community property, remains the same as before the Code.

When personal property is acquired while the husband and wife are residents of another State, if they subsequently move to this State, the law of the State where it was acquired governs as to whether it is separate or community property. 52 Cal. 302.

Supreme Court of California.

IN BANK.

[Filed October 26, 1883.]

No. 10,789.

PEOPLE, RESPONDENT, *v.* FONG AH SING, APPELLANT.

ALIBI—DYING DECLARATIONS. The commission of a criminal offense implies the presence of the defendant at the necessary time and place. Proof of an *alibi* is, therefore, as much of a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, nevertheless, with the other facts of the case, raise doubt enough to produce an acquittal.

ID. A reasonable doubt of the defendant's presence at the time and place necessary for the commission of the crime would seem necessarily to raise a reasonable doubt of his commission of it.

ID. Proof tending to establish an *alibi*, though insufficient of itself to establish that fact, is not to be excluded from the case. Whatever doubt, if any, such testimony may raise in the minds of the jurors is for their consideration; and if its weight alone or added to that of other evidence in the case be sufficient to reduce belief in their minds as to the defendant's guilt, to a reasonable doubt, they should acquit, for in every criminal case, when all the proof is in, the final question for the jury is, are all the essential averments of the indictment proved beyond a reasonable doubt.

ID. Dying declarations are restricted to the act of killing and to the circumstances immediately attending it and forming a part of the *res gestae*. When they relate to former and distinct transactions they do not come within the principle of necessity on which such declarations are received.

Appeal from Superior Court, San Francisco.

Attorney General for respondent.
L. Quint for appellant.

ROSS, J., delivered the opinion of the Court:

The defendant was charged with the crime of murder. His defense was that of *alibi*—he claiming that, at the time the deceased was killed, he (defendant) was at certain rooms about three blocks distant from where the murder was committed. Upon that question the evidence was conflicting. And upon that state of facts the defendant, through his counsel, requested the Court to charge the jury as follows:

"Whilst the prosecution must establish beyond a reasonable doubt the guilt of the defendant, it is not incumbent on the defendant to prove an *alibi*, beyond a reasonable doubt. Though the evidence offered to establish an *alibi* falls short of the weight of moral certainty as to the existence of the *alibi*, yet if it leave in the minds of the jury such a doubt or

uncertainty that taken by itself they could not find for or against the *alibi*, they are bound to carry such doubt into the case of the prosecution and to array it there as an element of the reasonable doubt, beyond which the prosecution must establish guilt. The defendant is entitled as much to the benefit of such doubt as to any other doubt raised by the evidence; and if its weight, alone or added to that of any other, be sufficient to reduce belief in their minds as to the defendant's guilt, to a reasonable doubt, they must acquit."

This instruction the Court below refused to give, but in its stead gave the jury as the law upon the subject of *alibi* the following:

"If the jury find the defendant to have been at another place, as for instance in the Society's rooms which have been spoken of in the evidence, at the time of this alleged shooting, and if his being there then creates a reasonable doubt of his having been present at the place of the alleged crime at the time of its alleged commission, he should have the benefit of that reasonable doubt and be acquitted."

The instruction requested was substantially correct and should have been given. The charge given was incorrect and should not have been given. The commission of a criminal offense implies, of course, the presence of the defendant at the necessary time and place. Proof of an *alibi* is, therefore, as much of a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, nevertheless, with the other facts of the case, raise doubts enough to produce an acquittal. A reasonable doubt of the defendant's presence at the time and place necessary for the commission of the crime, would seem necessarily to raise a reasonable doubt of his commission of it. But according to the charge of the Court below, the defendant was not to have the benefit of any doubt in regard to the alleged *alibi*, unless the jury should *find as a fact* that he was at another place than the place of shooting, when the shooting occurred. It is obvious that the finding of that fact would itself have established the *alibi*, and that would have ended the case of the prosecution. But proof tending to establish an *alibi*, though insufficient of itself to establish that fact, is not to be excluded from the case. Whatever doubt, if any, such testimony may raise in the minds of the jurors, is for their consideration; and if its weight, alone or added to that of other evidence in the case, be sufficient to reduce belief in their minds as to the defendant's guilt, to a reasonable doubt, they should acquit; for in every criminal case, when all the proof is in, the final question for the jury

is, are all the essential averments of the indictment proved beyond a reasonable doubt?

The dying declaration of the deceased was properly admitted in evidence, but the declaration included some matter foreign to an instrument of that nature, and which should have been excluded by the Court below from the consideration of the jury. We allude to the following statement of the declarant:

"I don't know any reason that Fong Ah Sing had for shooting me, unless it was that a few days before the shooting, I was bathing my feet up stairs over a room in which Fong Sing was sitting, and I spilled a little water on the floor, and some of it leaked through the floor and fell upon Fong Ah Sing. Fong Ah Sing was very angry thereat, and told the proprietor of the house that I must apologize and make him some present to prevent bad luck coming upon the house. The proprietor did make some little present to Fong Ah Sing, and I supposed the matter was settled."

Dying declarations are restricted to the act of killing and to the circumstances immediately attending it and forming a part of the *res gestae*. When they relate to former and distinct transactions they do not come within the principle of necessity on which such declarations are received. (Wharton's Crim. Ev., Sec. 278; 1 Greenleaf on Ev., Sec. 156; *State* v. *Draper*, 65 Mo., 335; *Leiber* v. *Commonwealth*, 9 Bush., 11; *Moses* v. *The State*, 35 Ala., 421; *The State* v. *Shelton*, 2 Jones, 360; *Nelson* v. *The State*, 7 Hump., 542; *Hackett* v. *The People*, 54 Barb., 370.)

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J., Sharpstein, J., McKee, J., Myrick, J., Thornton, J.

IN BANK.

[Filed October 13, 1883.]

No. 9234.

SHELLERS *v.* BROWN.

By the COURT:

Under no theory of the construction of the Constitution or the statutes now existing, can an election for Police Judge of the city of Sacramento be held on the 3d Wednesday of October.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed October 24, 1883.]

No. 7904.

CARMEN, RESPONDENT, *v.* ROSS, APPELLANT.

PRACTICE—PLEADING—COMPLAINT—DEMURRER—REPLEVIN—FINDING.

Appeal from Superior Court, Stanislaus County.

Maddux & Simmons for respondent.
Wright & Hazen for appellant.

By the COURT:

The demurrer to the complaint should have been sustained. This action is to recover possession of specific personal property, and it is averred in the complaint that the plaintiff was and is the owner *and in the possession of the property sued for.* This is an averment that the plaintiff was in the possession of the property sued for when this action was commenced. This being the case, the plaintiff had no cause of action. We do not think that this is cured by any other averment in the complaint.

The answer was demurred to on the ground, among others, that it did not state facts sufficient to constitute a defense. The demurrer was sustained generally. We are of opinion it was not well taken on the general ground above stated, for the answer does deny that the plaintiff is the owner of the property described in the complaint. The other ground of demurrer is so indefinitely stated, that we cannot tell to what portion of the answer it relates, and therefore say nothing in regard to it.

The defendant refused to amend his answer. Nevertheless, the Court below proceeded to try the case as if issues had been joined in it by proper pleading. This trial was entirely irregular erroneous. The cause seems to have been tried as if issues of fact had been made up, when in fact no issues had been joined.

The findings are contradictory. The Court, in effect, found that each party was in possession of the property sued for when the suit was commenced. We cannot see how any judgment could have been pronounced on such a contradiction.

Judgment reversed and cause remanded for proceedings in conformity with this opinion.

DEPARTMENT No. 2.

[Filed October 24, 1883.]

No. 7677.

ROSS *v.* BRUSIE,

By the COURT:

We are of opinion that the Court erred in sustaining the objection, on the ground of incompetency, to the following question put to the plaintiff while testifying: "Did you at any time within three years have any conversation with the defendant relative to the execution of this deed and bond?"

Judgment and order reversed and cause remanded.

DEPARTMENT No. 2.

[Filed October 12, 1883.]

No. 9148.

GARNIER, RESPONDENT, *v.* GRIMAUD ET AL., APELLANTS.

PRACTICE—NEW TRIAL.

Appeal from Superior Court, Los Angeles County.

H. Allen and *John Robarts* for respondent.

Glassell, Smith & Patton and *J. Brosseau* for appellants.

By the COURT:

This is an appeal from an order granting a new trial. Such a motion is addressed to the sound discretion of the Court below, and this Court will never interfere with the ruling of the trial Court unless there is an abuse of discretion. In this case we see no such abuse. The motion is made and was heard on the minutes of the Court. No statement setting forth the evidence as required by law (C. C. P., Sec 661) was made, and we cannot know on what evidence the Court below acted. The bill of exceptions is not such a document as the Statute requires to set forth this evidence. We must presume then that the Court below ruled correctly.

As to the notice of intention to move for a new trial, we are of opinion that the particulars of the insufficiency of the evidence to sustain the decision of the Court are sufficiently set forth in the notice. Further, we are of opinion that the Court might well have granted the new trial on the affidavits presented.

The order is affirmed.

IN BANK.

[Filed November 6, 1883.]

No. 10,851.

THE PEOPLE. RESPONDENT, *v.* COLLINS, APPELLANT.

CRIMINAL LAW—CONSPIRACY—HOMICIDE—EVIDENCE. The law holds each party to it responsible for the acts of each co-conspirator done in pursuance and furtherance of the common design, which extends to the consequences which might reasonably be expected to flow from carrying into effect the unlawful combination. *Accordingly*, no error was committed in admitting in evidence against defendant the acts and declarations of a co-conspirator in relation to the gun with which the murder was committed.

ID. Certain evidence tending to connect the defendant with the crime held admissible.

Appeal from Superior Court, Nevada County.

Attorney General, *Ford*, *Gaylord* and *Searles* for respondent.
Walling and *Macon* for appellant.

Ross, J., delivered the opinion of the Court:

About mid-day of the 1st of September, 1879, the Eureka stage *en route* from Eureka *via* North Bloomfield to Nevada City, in Nevada county of this State, was stopped when within three and one-half miles of its destination by two masked highwaymen, who forced the driver and passengers to alight, and thereupon proceeded to rob them. Among the passengers was William F. Cummings, who had with him a valise containing two bars of gold bullion, each about four inches long, two to three inches wide, and from one and one-half to two inches in thickness, and each of the value of from $3,500 to $4,000. When the robbers took hold of the valise, Cummings said it contained all his worldly possessions, and that he would defend it; and thereupon a scuffle ensued between him and them, during which one of the robbers fired upon him with a shotgun, killing him almost instantly. They then fled with the bullion of the murdered man. For that murder Collins, whose *alias* is Patterson, and one Thorne, *alias* Dorsey, were jointly indicted on the 26th of October, 1882. They were separately tried. Collins was convicted of murder in the first degree and sentenced to be hung. From the judgment of death and an order refusing him a new trial he prosecutes the present appeal, relying upon certain alleged errors in the ruling of the Court below.

It appears that nearly two years after the commission of the murder, Collins and one Roger O'Meara met in the jail

at St. Louis in the State of Missouri. Each was incarcerated for a crime alleged to have been committed by him in that State. They had known each other in California and had been inmates together of the State Prison at San Quentin, and, subsequently, had been confederates in the commission of other crimes within the State of California. When O'Meara met Collins in the St. Louis jail the conversation between them, according to O'Meara's testimony in the case at bar, turned upon the robbery and murder of the 1st of September, 1879; and in that conversation Collins confessed to him his own participation in them, detailing with great minuteness all the circumstances in relation to them, from the inception of the unlawful and wicked enterprise, in the pursuit of which the robbery and murder were committed, to and including the disposal of the bullion of the victim at New Orleans, Louisiana, and Louisville, Kentucky. According to the confession as testified to by O'Meara, Collins, Thorne and one Crumm met by appointment in the spring of 1879, at Stockton, and there arranged for a series of robberies, commencing their operations in Tuolumne county and continuing them in Sacramento and Yuba counties. About August, 1879, they met at the house of one Frazee, near Marysville, in Yuba county, where Thorne obtained the gun with which the murder was committed. About that time Crumm withdrew from the agreement, and Collins and Thorne went into Nevada county for the further prosecution of their enterprise, camped in the vicinity of Nevada City, and committed the robbery and murder in question on the 1st day of September.

Crumm was put upon the stand by the prosecution and testified to the meeting of Collins, Thorne and himself at Stockton, to the agreement to rob, the subsequent meeting at Frazee's about August, 1879, his withdrawal from the arrangement, and to declarations by Collins and Thorne that they would go into Nevada County and continue the business of robbing stages, mines and whatever else they could.

The first point made for the defendant is that this testimony of Crumm was inadmissible. We do not think so. It not only went to corroborate the confession, but it was good as independent testimony of the conspiracy to perpetrate robberies, formed by Collins, Thorne and Crumm in the first place, and its subsequent continuation by Collins and Thorne. The conspiracy, according to the testimony, contemplated the robbing of stages and their passengers whenever and wherever opportunity offered. The law holds each party to it responsible for the acts of each co-conspirator

done in pursuance and furtherance of the common design, which extends to the consequences which might reasonably be expected to flow from carrying into effect the unlawful combination. There was, therefore, no error in admitting, in evidence against Collins, the acts and declaration of Thorne, in relation to the gun with which the murder was committed. Besides, there was evidence tending to show that within an hour of the commission of the murder the defendant was seen in company with Thorne, in the immediate vicinity of the place of the murder, with the identical gun in his hand.

On the trial the People offered evidence tending to show that the murderers of Cummings took from him the two bars of gold bullion, and they also introduced proof tending to show that in December, 1879, at New Orleans and Louisville, the defendant had in his possession and disposed of gold bullion corresponding in amount to that proven to have been taken from the murdered man. It is objected that the bars of bullion possessed and disposed of by defendant in New Orleans and Louisville were not shown to have been the same bars taken from Cummings. It is true there was no direct evidence that this was so, nor was it necessary that there should have been. It had been shown that the defendant was discharged from the State Prison at San Quentin but a short time before the commission of the robbery and murder; that he was thus impecunious; that the robbery and murder were committed; that two bars of gold bullion were taken by the murderers from the murdered man; that shortly afterwards the defendant was in possession and disposed of gold bars corresponding in amount with that stolen, and that he and Thorne divided the proceeds. We have no difficulty in holding such testimony admissible as tending to connect the defendant with the commission of the crime. We see no error in the instructions nor in the rulings of the Court below prejudicial to any substantial right of the defendant.

Judment and order affirmed.

We concur: Myrick, J., Morrison, C. J., McKee, J., Thornton, J., Sharpstein, J., McKinstry, J.

IN BANK.

[Filed November 5, 1883.]

No. 7803.

PAULSON, APPELLANT, *v.* NUNAN, RESPONDENT.

PRACTICE ON APPEAL—FINDING. Reversed for want of a finding upon a material issue.

Appeal from Superior Court, San Francisco.

Brooks and *Leviston* for appellant.
C. Barbour for respondent.

Ross, J., delivered the opinion of the Court:

The complaint is in the usual form for the recovery of two horses. The answer justifies the taking by the defendant as Sheriff under certain stated writs. Plaintiff claimed the property as exempt under the sixth subdivision of Section 690 of the Code of Civil Procedure, and introduced evidence tending to show that he was a peddler and habitually earned his living by the use of the horses. When the case was last here (54 Cal. 123) it was held that the question as to whether the plaintiff was or was not a peddler, habitually earning his living by the use of the horses, was a material issue in the case, upon which there was then no finding, and there is none now. For the same reason that the case was then reversed and sent back for a new trial, it must be reversed and sent back now. The finding that is now relied on as determining that question was then regarded as but a conclusion of law, and it must be so regarded now.

Judgment and order reversed and cause remanded for a new trial.

We concur: Myrick, J., McKinstry, J., Sharpstein, J., Thornton, J., Morrison, C. J.

DEPARTMENT No. 2.

[Filed November 5, 1883.]

No. 7895.

HAHN, APPELLANT, *v.* SCHMIDT, RESPONDENT.

MALICIOUS PROSECUTION—MAGISTRATE—FORGERY. One who makes before a committing magistrate, an affidavit stating facts conceded to be true, which the magistrate erroneously supposes constitutes a crime, and proceeds accordingly, is not liable in damages to the person whom the magistrate causes to be arrested upon such affidavit.

ID. It is not necessary that a party who makes a complaint charging another with forgery should suppose that he, the party making the complaint is responsible upon the forged instrument in order to constitute good faith in making the complaint. A party is never responsible for the unauthorized use of his name.

Appeal from Superior Court, Alameda County.

Geo. W. Tyler for appellant.
S. P. Hall for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an appeal from a judgment, and from an order denying the plaintiff's motion for a new trial in an action for malicious prosecution.

There are but two exceptions before us:

1. To that portion of the charge of the Court contained in the following extract:

"Now, I instruct you that this complaint, on the face of it, not only does not state facts which constitute the crime of forgery, or any crime, it merely shows that the plaintiff signed an acceptance thus: Joseph Schmidt, per William Hahn, and this in law does not constitute a forgery. Yet the facts stated in the complaint, although not constituting the crime of forgery, may be true, and if made to the Justice in good faith, and the Justice, upon the facts so stated, adjudged the offense to be forgery, and issued his warrant under which the arrest was made, then under such circumstances, the defendant would not be liable, and you are, therefore, instructed that if you find that the facts stated in the affidavit or the complaint upon which the plaintiff was prosecuted were true, and defendant, at the time, believed the facts to be true, then the defendant cannot be held liable in this action, even though such facts do not technically constitute a crime. Do not misapprehend my instruction. You must find that the charge made or facts stated are true, and that defendant so knew or believed before this complaint can form a defense.

"In determining whether this complaint was in fact true, you should consider whether in making the complaint the defendant suppressed any facts shown by the evidence to be known by him. In this connection you may consider the restriction placed upon the plaintiff in the power of attorney, which rendered the acceptance void; and also the evidence on the subject of the circumstances under which the acceptance was made."

2. To the refusal of the Court to give in this connection an instruction, asked by the plaintiff, of which the following is a copy:

"That in order for such complaint to be made in good faith by Schmidt he must have supposed that at the time he made it he was responsible upon the acceptance, and that it charged him with the payment of the money."

The complaint referred to is in the form of an affidavit made by the defendant before a Justice of the Peace who thereupon issued a warrant for the arrest of the plaintiff,

and upon which he was arrested and brought before the Justice on a charge of forgery. The charge was dismissed.

The only question which arises upon the record is, whether one who makes before a committing magistrate an affidavit stating facts, conceded to be true, which the magistrate erroneously supposes constitute a crime, and proceeds accordingly, is liable in damages to the person who the magistrate causes to be arrested upon such affidavit.

In *Leigh* v. *Webb* (3 Esp. 164), Lord Eldon ruled that if a party makes a complaint before a Justice, which the Justice conceives to amount to a felony, and issues his warrant against the party complained against, and the facts do not amount to felony, no action for malicious prosecution will lie against the party who made the complaint. In *Cohn* v. *Morgan* (6 Dow, and Ry. 8), Abbott, C. J., said: "There was nothing in the defendant's conduct to show that he was influenced by malice. To support the averment of malice it must be shown that the charge is willfully false. But here, according to the evidence, the defendant merely related his story to the magistrate, leaving it to him to determine whether the facts amounted to felony."

Referring to *Cohn* v. *Morgan, supra,* Lord Denman in *Curratt* v. *Morley* (1 Gale & Dav., 275), said: "It is clear from that and other cases, and upon principle, that a party who merely originates a suit by stating his case to a Court of justice, is not guilty of trespass, though the proceeding should be erroneous or without jurisdiction."

We are unable to find any English case in which *Leigh* v. *Webb, supra,* has been overruled, or the soundness of the views expressed by Lord Eldon even questioned. In *McNeeley* v. *Driskill* (2 Blackf., 259), *Leigh* v. *Webb* was cited and followed.

But in order to constitute a defense to an action for malicious prosecution, the facts stated in the complaint, if they do not constitute a crime, must nevertheless be true. (*Dennis* v. *Ryan*, 65 N. Y. 385; *Collins* v. *Lane*, 7 Blackf. 416; *Forrest* v. *Collier*, 20 Ala. 175; *Anderson* v. *Buchanan*, Wright's Ohio R., 175; *Forbi* v. *Danks*, 30 Eng. L. and Eq. R. 115.)

The Court not only so charged the jury, but went further than any case which has fallen under our observation goes, and charged that the defendant must have believed at the time of making the complaint that the facts stated in it were true, in order to shield himself from liability.

In each of the cases cited by appellant's counsel the complaint on which the warrant for the arrest of the party issued

charged him with a criminal offense, or if it did not, was false, as in *Dennis* v. *Ryan*, (65 N. Y. 385). In *Sutton* v. *McConnell* (46 Wis. 269), the defense was that the facts which the defendant stated to the magistrate did not constitute the offense charged in the complaint. But the defendant swore to the complaint and the Court held that he could not avail himself of the statement which he made to the magistrate, a person unlearned in the law, and his advice thereon, before the complaint was prepared, as a defense to an action of malicious prosecution, based upon his having caused the arrest of the plaintiff on a false and malicious charge.

The charge of the Court was as favorable to the plaintiff as the law would admit of its being; and the instruction asked and refused was properly refused. It is not necessary that a party who makes a complaint charging another with forgery should suppose that he, the party making the complaint, is responsible upon the forged instrument in order to constitute good faith in making the complaint. A party is never responsible for an unauthorized use of his name.

Judgment and order affirmed.

We concur: Thornton, J., Myrick, J.

IN BANK.

[Filed October 30, 1883.]

No. 10,880.

EX PARTE A. M. S. CARPENTER ON HABEAS CORPUS.

HABEAS CORPUS—PERJURY—ACKNOWLEDGMENT OF DEED BEFORE NOTARY. A Notary Public has jurisdiction to administer an oath to the party acknowledging the execution of a deed, for the purpose of identifying him; and the party being a competent witness, and his testimony material to the proceeding, there is probable cause for holding him to answer upon a charge of perjury, his testimony before the notary having been shown to be false.

MCKEE, J., delivered the opinion of the Court:

The petitioner is held in custody by an order of commitment holding him to answer upon a charge of perjury. He complains that his imprisonment is illegal, because there was no evidence before the committing magistrate to sustain the charge, and no sufficient cause to believe him guilty.

The evidence upon which the order was made showed that between the hours of eight and nine o'clock on the night of

the 21st of April, 1883, the petitioner appeared before a Notary Public in Solano county, to acknowledge the execution of a deed, which he then exhibited to the Notary, signed by one E. Bouchard, as the grantor therein named. The Notary, having had no personal knowlede of the petitioner, administered to him an oath, as a witness in his own behalf for the purpose of determining whether he was the person who had signed the deed which he wished to acknowledge; and the petitioner on oath testified that he was E. Bouchard, the person named in and who executed the deed. Upon that evidence the Notary took the acknowledgment, certified to it, and returned the deed with his certificate annexed to the petitioner.

The identity of a party acknowledging the execution of an instrument is an essential fact to be found by the officer taking the acknowledgment; and it must be found by him from his personal knowledge of the person, or from satisfactory evidence of a witness; and when found it must be stated in the certificate of acknowledgment. In the proceeding before the Notary the testimony given by the petitioner was therefore material, and the evidence before the committing magistrate showed that it was false. Being false, the act of taking the oath was an act coupled with an intent prejudicial to one or other or both of the parties named in the deed, and the evidence made a sufficient cause to hold the petitioner to answer upon the charge of perjury, if the Notary had authority to administer the oath.

There is no question that the Notary was an officer legally authorized to take and certify acknowledgments to written instruments, and to administer oaths and take testimony for that purpose. (Sections 1181, C. C. and 2093, C. C. P.) His jurisdiction, it is true, is limited by law to cases in which he personally knows, or has satisfactory evidence on the oath or affirmation of a credible witness, that the person making the acknowledgment is the person who executed the instrument.

In the proceeding commenced by the petitioner the Notary had jurisdiction; and, as the petitioner was unknown to him, he had authority to administer an oath to any credible witness for the purpose of ascertaining and determining the fact of the petitioner's identity with the grantor named in the deed, before taking his acknowledgment; the question, therefore, arises whether, under such circumstances, the petitioner was a competent witness, in his own behalf, to prove that he was the person described in and who had executed the deed.

By the Practice Act of 1850, all persons who were parties to an action or proceeding, or for whose immediate benefit the action or proceeding was prosecuted or defended, or who were the assignors of the things in action for the purpose of becoming witnesses, and all black and mulatto persons and Indians, in actions to which a white person was a party, were excluded from testifying. (Sections 304–5–6, Statutes 1850, p. 455.) And "no acknowledgment of any conveyance whereby any real estate was to be conveyed, or might be affected, could be legally taken, unless the person offering to make such acknowledgment was personally known to the officer taking the acknowledgment, to be the person whose name was subscribed to the conveyance as a party thereto or was proved to be such by the oath of a credible witness." The name of the witness was required to be inserted in the certificate of acknowledgment, and he had to be another than the grantor; for the grantor himself could not, at that time, as a witness in his own behalf, prove the execution of his deed. The deed had to be attested, and its execution could be proved only: "First, by the testimony of a subscribing witness; second, when all the subscribing witnesses were dead or could not be had, by evidence of the handwriting of the party and of at least one subscribing witness given by a credible witness to each signature." (Statutes of 1850, pp. 249–50.)

In 1851 the Legislature declared all persons competent to testify, except persons to an action or proceeding, or for whose immediate benefit the action or proceeding was to be prosecuted or defended, all persons of unsound mind, children under ten years of age, who appeared incapacitated to receive just impressions of facts and to relate them truly, and Indians or persons having one-fourth or more of Indian blood, etc. (Sec. 391–2–3, Stats. 1851, pp. 113–4.) In 1854 the disqualification of a witness was extended to "all persons who had a present certain and vested interest in the event of the action or proceeding;" and to all unpardoned convicts of felony. (Stats. 1854, pp. 466–7.) Subsequently, by an Act passed April 27, 1863, Sections 391 and 392 of the Act of 1854 were so amended that the disqualification of interest in the action or proceeding was entirely removed; and it was enacted that "the parties to any action or proceeding were competent to give evidence either *viva voce* or by deposition, or in any other legal mode, as any other witness, in behalf of himself, or of any of the parties to the action or proceeding," except where the adverse party or the party for whose immediate benefit the action or proceeding was

prosecuted or defended, was the representative of a deceased person, and the facts to be proved transpired before his death. At the same time it was provided that "nothing contained in Section 392 shall affect the laws in relation to the attestation of any instrument required to be attested." (Stats. of 1863, pp. 701–2.) The amendments of 1863 continued to be the law of the competency of witnesses until the Codes swept away mostly all of the disqualifications which had rendered persons incompetent. By Sections 1879–80, C. C. P., no person was excluded from testifying because of interest in the action or proceeding to which he was a party, nor because of conviction for crime, nor on account of race, color or previous condition of servitude; all persons were declared competent to testify, except persons of unsound mind, children under ten years of age, who appeared incapable of receiving just impressions of facts, or of relating them truly, and parties to, or in whose behalf, an action or proceeding was commenced against an executor or administrator upon a claim or demand against the estate of a deceased person, and professional persons as to confidential communications made to them in their professional character (Sections 1879–80–81, C. C. P.); and by Section 1195 of the Civil Code, it was provided that "proof of the execution of an instrument, when not acknowledged, may be made either:

"1. By the party executing it, or either of them; or,

2. By a subscribing witness; or,

3. By other witnesses, in cases mentioned in Section 1198."

At the time the petitioner appeared before the Notary to acknowledge the deed, which was signed by E. Bouchard, whom the petitioner falsely personated, he was not within any of the exceptions enumerated in Sections 1879–80, C. C. P.; he was therefore a competent witness in his own behalf, in the proceeding before the Notary to which he was a party; and when he testified falsely on the oath administered to him by the Notary he subjected himself to be proceeded against for perjury. "Every person who, having taken an oath that he will testify, depose, or certify truly before any competent tribunal, officer or person, in any of the cases in which such an oath may be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury." (Section 118, Penal Code.) And it is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner (Sec. 121, *id.*), nor is the incompetency even of a witness any defense; it is sufficient that he did give such testimony. (Sec. 122, *id.*)

It follows: As the Notary had jurisdiction in the proceedings before him to administer an oath to the petitioner, that the oath administered was judicial; and as the testimony of the petitioner, given on oath, was material to the proceeding and shown to be false, there was probable cause for holding him to answer upon the charge against him.

Writ dismissed and petitioner remanded.

We concur: Myrick, J., Sharpstein, J.

I concur in the judgment: Thornton, J.

We dissent: Ross, J., McKinstry, J.

DEPARTMENT NO. 2.

[Filed November 2, 1883.]

No. 7664.

RICHMOND, APPELLANT, *v.* LATTIN, RESPONDENT.

FORECLOSURE OF MORTGAGE—CERTIFICATE OF DISCHARGE—DEMAND.

Appeal from Superior Court, Alameda County.

Moore & Reynolds for appellant.

Martin & Plunket for respondent.

By the COURT:

This is an action to foreclose a mortgage. The affirmative relief asked for by the defendant is sufficiently stated as a counter-claim, as to the $1,000 (Subd. 2, Sec. 438, C. C. P.), and the evidence relating thereto is sufficient to sustain the findings. As to the $100 claimed as a forfeit for not executing, on demand, a certificate of discharge of the mortgage, the findings relating thereto are not sustained by the evidence. There is no evidence of the demand required by Section 2941 of the Civil Code. For want of evidence to sustain the findings in regard to the demand for satisfaction of the mortgage, and as we cannot direct a new trial on that portion of the case only: It is therefore ordered that if, within twenty days next succeeding the filing of this opinion, the defendant shall file in this Court a stipulation in due form, remitting the sum of $100 from the judgment in favor of the defendant, and consenting to a reduction of said judgment to that extent, the said judgment in that event shall be affirmed as to the remainder thereof. But if the defendant shall fail or neglect to file said stipulation within the said period above prescribed, then that said judgment be reversed and said cause remanded for a new trial.

[Filed November 3, 1883.]

No. 10,904.

EX PARTE WILLIAM A. MESS, ON HABEAS CORPUS.

BEFORE THORNTON, J.

HABEAS CORPUS—SENTENCE. The irregularity of sentencing a prisoner convicted of a felony, before the expiration of two days after verdict (1191 Penal C.) is not ground for discharge on habeas corpus.

Clara Foltz and *F. A. Hornblower* for petitioner.
Alfred Clarke—*Contra.*

The defendant was, on an information regularly filed, convicted in the Superior Court of the city and county of San Francisco of the crime of forgery. The verdict was rendered on the 25th of October, 1883, and at the same time the 27th of the same month, at 10 o'clock, A. M., was set for pronouncing judgment. On that day the defendant, with his attorney, appeared in Court; and upon his being asked why judgment should not be pronounced against him, he moved for a continuance of sentence for three weeks, which motion was denied. He also moved for a new trial, on the ground of newly discovered evidence. The Court also denied this motion, and, as recited in the entry, "the defendant showing no legal cause why judgment should not be pronounced against him," the Court proceeded to pronounce judgment of imprisonment in the State Prison at San Quentin for seven years. The defendant, as appears by the return of the Warden of the prison, was held in custody by him under an order of commitment from the Superior Court above named, regular on its face, issued upon this judgment. It is now contended that the judgment and process under which the defendant is detained are void, for the reason that the period of two days was not allowed to elapse after the verdict of guilty was rendered before judgment was pronounced, and Section 1191 Penal Code is cited and relied on.

This may have been an irregularity for which the judgment should have been reversed on appeal, but the judgment and process issued upon it are not void. Section 1191 above referred to lays down a rule of procedure, and in general it should be observed; but I cannot think that it was ever intended that a violation of it should render the judgment so pronounced of no effect. The Court had jurisdiction of the subject-matter and the defendant, and was not deprived of it by a judgment the defect in which, if there was any, was nothing beyond non-adherence to a prescribed rule of pro-

cedure, and not such a material defect as made the proceeding illegal and void. (See *ex parte* Gibson, 31 Cal. 625–6, where the distinction between irregularity and illegality is pointed out.)

I will add here that I do not wish to be understood as holding that the pronouncing of judgment on the 27th of October was erroneous; I only intend to say that the action of the Court, if defective at all, was only error, and not without its jurisdiction.

The prisoner must be remanded to the custody of the Warden of the State Preson at San Quentin, and it is so ordered.

DEPARTMENT No. 2.

[Filed November 3, 1883.]

No. 8172.

WHITTIER, RESPONDENT, *v.* HOLLISTER, APPELLANT.

MECHANIC'S LIEN. There exists no lien for materials furnished in the construction of a building, beyond the contract price.

Appeal from Superior Court, Alameda County.

H. A. Leake for respondent.
C. J. Swift for appellant.

By the COURT:

This is an action to enforce a lien for materials furnished to a sub-contractor which were used in the construction of a building on the premises of the defendant Hollister. The building was erected in pursuance of a contract. There is no allegation in the complaint that any money due or to become due from the owner to the contractor. The defendant Hollister demurred to the complaint.

The question involved in this appeal was disposed of in *Latson* v. *Nelson*, 11 Pac. C. L. J. p. 589.

The judgment, so far as it relates to the defendant Hollister and so far as it concerns the real estate mentioned therein and directs a sale thereof, and the order denying her motion for a new trial, are reversed, and the cause is remanded with instruction to sustain the demurrer of the defendant Hollister. (*Renton* v. *Conley*, 49 Cal. 185; *Wells* v. *Cann*, 51 *id.* 453.)

IN BANK.

[Filed October 18, 1883.]

No. 10,849.

THE PEOPLE, RESPONDENT,

v.

PATRICK SMITH, APPELLANT.

INSTRUCTION—EXCEPTION—REPORTER—EMBEZZLEMENT—VERDICT—ERROR—MISTAKE. The charge to the jury was taken down by the reporter; "the report" of the charge forms part of the record and is deemed excepted to. (Penal Code, 1176.)

ID. In some copies of the statute the word "or" is erroneously printed "of," so that the clause in Section 1176 reads: "But the written charges of the report, with the indorsements," etc. But held, if the law so read, the meaning would be the same.

ID. The information was for embezzlement of $388,75. The verdict, "guilty as charged," is held sufficient.

Appeal from Superior Court, San Francisco.

Attorney General for respondent.
Darwin & Murphy for appellant.

By the COURT:

The charge to the jury was taken down by the reporter; "the report" of the charge forms part of the record and is deemed excepted to. (Pen. C., 1,176.) The section reads: "When written charges have been presented, given or refused, or when the charges have been taken down by the reporter, the question presented in said charges need not be excepted to or embodied in a bill of exceptions, but the written charges *or* the report, with the indorsements showing the action of the Court, form part of the record, and any error in the decision of the Court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." In some copies of the statute the "or" is erroneously printed "of," so that the clause reads "but the written charges of the report, with the indorsements," etc. Even, however, if the law so read, the meaning would be the same.

The verdict "guilty as charged," is sufficient. *People* v. *Whitley*, No. 10,834, opinion filed October 3, 1883.

There is no material error in the charge.

Judgment and order affirmed.

IN BANK.

[Filed October 3, 1883.]

No. 10,834.

PEOPLE, RESPONDENT v. WHITELY, APPELLANT.

Appeal from Superior Court, San Francisco.

Attorney General for respondent.
C. H. Wolff and R. M. Swain for appellant.

By the COURT:

We think it appears that the examination was before a Police Magistrate. The commitment is signed by "James Lawler, Judge of the Police Judge's Court No. 2, of the city and county of San Francisco."

The defendant was charged with the crime of grand larceny, and the jury, by their verdict, found her "guilty as charged." This was a sufficient finding of the degree.

Judgment and orders appealed from affirmed.

DEPARTMENT No. 2.

[Filed October, 30, 1883.]

No. 9162.

CHILDS v. MOTT, ADMINISTRATOR.

By the COURT:

There is no error in the record in this case, and the judgment and order are affirmed.

DEPARTMENT No. 2.

Filed October 31, 1883.

No. 7862.

KORNAHRENS v. TYRRELL.

By the COURT:

There is no error in the record, and the judgment and order are affirmed.

DEPARTMENT No. 2.

[Filed October 12, 1883.]

No. 8960.

HUTCHINGS, ADMINISTRATOR, ETC., RESPONDENT,

v.

CLARK, APPELLANT.

Appeal from Superior Court, Los Angeles County.

Barclay & Wilson and *Smith & Hupp* for respondent.
Thom & Stephens and *M. L. Wicks* for appellant.

By the COURT:

The power of attorney did not authorize satisfaction of the mortgage to be entered until the note was paid, and this event never occurred. We find no error in the record, and the judgment and order are affiirmed.

ERRATUM.

The syllabus in *Holmes* v. *McCleary*, 12 Pac. C. L. Journal, p. 246, should read, "An order denying a motion for a new trial of a motion is not appealable." The words "of a motion" were omitted by mistake.

Abstract of a Recent Decision.

JUDGMENT—COLLUSION—COLLATERAL INQUIRY. A collusive judgment may be inquired into collaterally. Judgments entered or maintained by collusion or fraud of both parties are to be distinguished, however, from judgments obtained by the fraud of the plaintiff; the former are void as to creditors only, and can be attacked in any collateral proceeding by them, whilst the latter can be attacked by the defendant alone, directly and in the proper Court. A judgment confessed voluntarily by an insolvent or indebted man for more than is due, is *prima facie* fraudulent within the statute of 13 Eliz. c. 6; but then it is only *prima facie* fraudulent, and the presumption may be rebutted. *Meckley's Appeal*, S. C. Pa., May 7, 1883; 40 Leg. Int. 336.

New Law Publications.

THE AMERICAN AND ENGLISH RAILROAD CASES: Edited by Lawrence Lewis, Jr.; Published by Edward Thompson, Northport, New York. Volume X.

INSANITY CONSIDERED IN ITS MEDICO-LEGAL RELATIONS: By T. R. Buckham, A. M., M. D. J. B. Lippincot & Co., Philadelphia, Publishers. For sale by Joseph A. Hoffman, 208 Montgomery St.

The first thing that we wish to commend about this book is its clear, large, readable type. There is a pleasure in reading a book so well printed. The object of the book is to prove that insanity is a phsyical disease, subject to physical treatment, but a specialty of itself, about which no M. D., unless he is such a specialist, can testify correctly.

The author outlines the various theories about insanity, compares them, and decides in favor of the "*Physico-Media*" theory.

The *Psychical* or *Metaphysical* theory regards the mind as a distinct, intangible, incorporeal entity, independent of the body, and regards insanity as solely a mental disease.

The "Somatic" theory treats the mind as a product or function of the body or rather of the brain. According to this theory there is a destiny made for a man by his ancestors, and no one can evade, were he able to attempt it, the tyrrany of his organization. Man is the victim of heredity, which controls his fate. This theory precludes the possibility of an independent will.

The "Intermediate" theory treats the mind as both independent of and dependent on the brain, and hence regards insanity as due to mental and phyical causes.

The "*Phsico-Media*" theory treats the mind as a distinct, intangible, incorporeal entity, but recognizes the most intimate relations between mind and body, and holds that in this life the mind is wholly dependent for the manifestations of its operations on certain organs of the body which are called "*physical media.*"

This theory being admitted, insanity is "a diseased or disordered condition, or malformation, of the phsical organs through which the mind receives impressions or manifests its operations, by which the will and judgment are impaired, and the conduct rendered irrational."

"Insanity being the result of physical disease, it is a matter of fact to be determined by medical experts, not a matter of law to be decided by legal tests and maxims."

Pacific Coast Law Journal.

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Current Topics.

LORD COLERIDGE ON DIFFERENCES IN JUDICIAL SYSTEMS.

[From his New York Address.]

It seems to me that there are one or two other differences, which upon clear, good and entirely uncontradicted evidence, exist between our system and yours. I am told with one voice that our Courts in England go faster than your Courts in America and I cannot say with what pleasure an old, narrow-minded insular received the intelligence that in any thing—even in a lawsuit—the old country went faster than the new. [Laughter.] I am told also—and it seems to be the fact—that the judges in England take the liberty of assuming more the direction of affairs in cases which are tried before them, whether with or without a jury, than the practice of some of your states and the actual statutes in others permit to the judges in this country. It is not for me to express an opinion as to whether you are right or wrong. From our point of view, and in our circumstances, I cannot help thinking we are right; but nevertheless, I am not so presumptuos as to deny that it is very likely that from your point of view, and in your very different circumstances, you may be right, too, because, where the circumstances differ, the conclusions will naturally not be the same. One thing seems to me clear—that in England, with our fewer judges,

we dispose, and dispose without arrears, of a very sufficient and satisfactory number of cases; and in this country upon the whole, in many states, and certainly, as I understand, in the Courts of the Union, there is a very considerable arrear at the present time.

You are probably aware that we in England have been engaged for the last ten years, beginning in 1873, when, as Attorney-General, I was responsible for passing the Judicature Act through the House of Commons, in endeavoring to cheapen and simplify and expedite our procedure upon the lines of those salutary statutes which the wisdom of Parliament enacted about thirty years ago (in 1852–54).

At this moment, a committee, of which I have the honor to be chairman, having reported in favor of certain amendments, the judges have made large alterations in our rules of procedure, which I hope may be beneficial, but which I am not wise enough to undertake to say will be beneficial; for no man can hope to tell, without practical experience, what will be the real operation of a new Code of Procedure.

But it was high time that something was done to expedite, and amend and simplify the common law, which deserves all the praise which your Chief Judge and Mr. Evarts have lavished upon it, and which, some thirty years ago, was in serious danger. It had become associated in the minds of many men with narrow technicality and substantial injustice.

That was not the fault of the common law, but it was the fault, if fault it were, of the system of pleading, which looked at practically, was a small part of the common law, but very powerful men had contrived to make it appear that it was almost the whole of it—that the science of statement was far more important than the substance of the right, and that rights of litigants themselves were comparatively unimportant unless they illustrated some obscure, interesting and subtle point of the science of stating those rights.

Now, I prefer to confirm what I am telling you, by authority much greater than my own, because it might be said, and said with truth, that I was merely condemning a system which I possibly disliked, because I never was very proficient in it. I well recollect to have heard Sir William Erle, who was a great lawyer, who was chief judge of the Common Pleas, and whose name may be known to many of you on this side of the Atlantic—relate a remarkable conversation that took place between a learned baron —a famous man of those days—himself, and a third party and a third person, very distinguished in his day, but little remembered in the present; Charles Austin, a man of singular gifts of mind, who devoted himself chiefly to making a fortune,

and whose reputation, immense with his contemporaries, is chiefly known to posterity by a striking sketch of him given in his autobiography.

These three men were in a London Club, and the baron said that he had joined in the building of sixteen volumes of *Meeson & Welby*, and that that was a very great thing indeed for any man to do. Sir William Erle, with more candor than courtesy, replied that it was a fortunate thing there had not been a seventeenth volume of *Meeson & Welby*, for if there had, the common law would disappear from creation amidst the universal jeers and hisses of mankind, and Charles Austin followed up this observation of Sir Wm. Erle in this way: he said: "I have heard you say that before, baron, and suppose there is something in it, but now, in candor—in the palace of truth—do you think that the world, or that England itself, would have been the least worst off if every case in every volume of *Meeson & Welsby* had been decided the other way?

Now, you must not pursue a story, you know, beyond its legitimate conclusion, and what exactly it was that the learned baron answered, I am really unable to say; but it is a comfort to think that those subtleties, if there was any merit in them, have not entirely been banished from the earth, and I am told that there is a State in this progressive Union in which they are, at this moment, as alive as ever, and I venture upon this subject, to make you a practical suggestion.

You have lately procured, may I say most wisely, a great National Park into which the beauties and glories of nature, and the strange and eccentric forms which natural objects sometime assume, may be preserved forever for the instruction and delight of the citizens of this great Republic. Could it not be arranged, that with the sanction of the State, some corner in that one State should be preserved, as a kind of pleading park, in which the glories of the *negative pregnant, absque hoc, replication de injuria, rebutter* and *sur-rebutter*, and all the other weird and fanciful creations of the pleader's brain might be preserved for future ages to gratify the respectful curiosity of your descendants, and that our good old English judges, if ever they re-visit the glimpses of the moon, might have some place where their weary souls might rest—some place where they might still find the form preferred to the substance, the statement to the thing stated. I cannot help thinking that that would be a matter worthy of the liberality, of the genius and conservative instincts of the great American public. But it is really, to speak seriously, a great for me to find that slowly, and if I may say so, with wise hesitancy, you are gradually admitting into your system those changes which we have lately made, as and when they satisfy the needs, the temper, and the genius of your people.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed November 2, 1883.]

No. 8810.

McPHERSON, APPELLANT,

v.

WESTON ET AL., RESPONDENTS.

ACTION — PROMISSORY NOTE — CONTRIBUTION — LIMITATION. Weston and Boushey executed a promissory note and mortgage payable to Alexander Forbes and Robinson. Forbes and Robinson indorsed the note to Forbes Bros., a firm consisting of Alexander Forbes and Charles Forbes. This firm dissolved before the maturity of the note, and Alexander Forbes, in the name of Forbes Bros., transferred the note and mortgage to the plaintiff McPherson, who brought this action against Robinson, Alexander Forbes and the makers of the note.

Held, (1). That the action could be maintained notwithstanding the plaintiff paid no money for the transfer, and notwithstanding the note was the property of Forbes Bros. and not of Alexander Forbes. (2.) That the Statute of Limitations barred an action of this character in four years.

Appeal from Superior Court, Kern County.

Vincent Neale for appellant.
L. Shearer and *L. L. Robinson* for respondents.

By the COURT:

This is an action brought by plaintiff on the 22d of March, 1881, in the Superior Court of the county of Kern, to foreclose a mortgage, against E. J. Weston, Stephen Boushey, L. L. Robinson, Alexander Forbes, William Temple, Julius Boushey, Richard Roe and John Doe. The mortgage was executed to L. L. Robinson and Alexander Forbes by Weston and Boushey to secure a promissory note for $5,000, executed by the latter to the former. The note and mortgage bear date March 23, 1876, and the former matured one year after date, and bore interest at the rate of two per cent per month, compounding. The payees of the note indorsed and transferred the note and mortgage to Forbes Brothers, a copartnership consisting of the above named Alexander Forbes and Charles Forbes, who paid five thousand dollars to Robinson and Alexander Forbes, and this money was paid over

by the last named persons to the makers of the note. At the time of indorsing this note the payees waived demand, protest and notice of the same. It appears that during the time of the existence of the firm of Forbes Bros., Alexander Forbes was the managing partner of the firm. This firm continued in existence until the first day of January, 1877.

The above facts were found by the Court, and the Court further found:

"That after the maturity of said promissory note, to wit: about the 27th of October, 1880, the said Alexander Forbes instituted an action in this Court against E. J. Weston, Stephen Boushey, Julius Boushey, Wm. Temple, L. L. Robinson, John Doe and and Richard Roe (defendants also in this action), and upon the said note and mortgage, for a decree for the foreclosure and sale of said mortgaged premises. That the complaint in said action was verified by said Alexander Forbes, and therein it was claimed that there was due to him, the said Alexander Forbes, from the defendant, L. L. Robinson, as joint indorser with him of said note, the sum of $2,500 for principal, and $3,697.65 for interest on said promissory note.

"That said Alexander Forbes, in said complaint verified by him, averred that at the maturity of said promissory note, to wit: March 23, 1877, he was compelled to pay and did pay the same, and that he was at the time of the verification of said complaint, to wit: the 16th day of October, A. D. 1880, the lawful owner of said promissory note and mortgage; and in that action said Alexander Forbes sought to recover from the said L. L. Robinson the moiety of the amount said Forbes had paid upon said note, as joint indorser thereof with said Robinson, together with interest thereupon.

"That to the complaint in the action the defendant, L. L. Robinson, demurred, upon the ground that the same did not state a cause of action against him, and that the cause of action for a contribution therein claimed was barred by limitation. That upon the hearing of counsel thereupon said demurrer was sustained.

"That thereafter, on March 15, 1881, the said Alexander Forbes wrote to the said L. L. Robinson, informing him that said demurrer had been sustained, and threatening to dispose of and transfer the note and mortgage, and have a new suit brought by the transferee, unless the said Robinson should pay to said Alexander Forbes one-half of the principal of said promissory note, with interest thereon at one per cent. per month. That said Alexander Forbes

afterwards, on or about the —— day of March, 1881, caused said action, *Forbes* v. *Weston, et al.*, to be dismissed, and on the 19th day of March, 1881, indorsed the said promissory note in the name of said Forbes Bros., and delivered the same to William McPherson, the plaintiff in the action.

"That Vincent Neale, Esq., the attorney of the plaintiff in this action, was also attorney for the said Alexander Forbes, in said former suit of *Forbes* v. *Weston, et al.*, and said Neale counseled and brought about the transfer of said note and mortgage by said Forbes to said McPherson. That upon the indorsement and delivery of said promissory note to him, the said McPherson delivered his promissory note of $14,000 payable to Forbes Bros.

"That there was no money or other consideration given therefor.

"That it was understood that said note of $14,000 was not to be paid, and the matter was regarded as an exchange of checks between Forbes and McPherson.

"That said $14,000 note has not been paid."

The Court found *inter alia* the following conclusions of law:

"That on the 1st day of January, 1877, by the dissolution of copartnership between Charles Forbes and Alexander Forbes, the said note and mortgage became the individual property of Alexander Forbes, and on the 23d day of March, 1877, the said Alexander Forbes was the owner and holder thereof.

"That from Alexander Forbes individually holding the note after the dissolution of said firm of Forbes Bros., it must be presumed that he paid the note at the time of the dissolution."

Judgment was entered against the makers of the note and in favor of Robinson. The plaintiff appealed.

That the plaintiff had a cause of action on this note and was entitled to maintain it against the makers and indorsers of the note, there can be no doubt. The action by plaintiff was brought on the note, and not on any implied contract arising from a loan of money to Robinson by Forbes. The cause of action was not barred until the lapse of four years from maturity. The note matured on the 23d of March, 1877, and the action was brought on the 22d of March, 1881. The action was not then barred as to Robinson, on which ground the Court below rested its judgment in favor of Robinson.

It is argued that *Chipman* v. *Morrill* (20 Cal. 130) sustains the view that the action is barred. We see no reason for any such conclusion. The case was this: Chipman, Morrill

and Webster purchased a piece of property together, Chipman taking an undivided one-half. and Morrill and Webster each one undivided fourth, and for the purchase money executed their joint note. The note was not paid. Action was brought against the makers above named, and judgment recovered. Execution issued on this judgment, was levied on Chipman's property, the property sold, and the proceeds applied to the payment of the judgment.

Chipman brought a joint action against Morill and Webster to recover their proportion of the debt, which had been paid by a sale of his property. The Court held, first, that a joint action could not be maintained; and, second, that the judgment on the note having been paid by the plaintiff, the action was not on the written instrument, but on the implied assumpsit of each defendant to reimburse what had been paid for each by the plaintiff.

As to the first part the Court said: "But the case is not one for contribution between parties who have sustained a common loss upon a common liability. The note of the plaintiff and defendants, upon which the judgment was rendered, was given upon the purchase of real estate in which the parties took separate and distinct interests—the plaintiff one undivided half, and each of the defendants one undivided fourth; and between themselves the obligation of each was to pay for his respective interest. In giving their joint note for the whole amount of the purchase money, each party was principal for the amount of his own interest, and co-surety for the remaining interests. Thus the plaintiff was principal for one-half of the purchase money and co-surety with Webster for one-fourth of the same for Morrill, and co-surety with Morrill for one-fourth for Webster. (Goodall and Wentworth, 20 Maine, 322.) When, therefore, the plaintiff paid the entire amount of the judgment recovered upon the note—or what is the same thing, when the proceeds of the property of the plaintiff sold under execution were applied to such payment—he became entitled to maintain an action against the defendant for moneys paid on their account. The demands which he could then assert were several in their character. They were demands not for contribution, but for reimbursement of moneys paid. The action should, therefore, have been against the defendants separately, upon the assumpsit which the law implies where a surety is compelled to advance money for his principal." (20 Cal. 136.)

Here Alexander Forbes and Robinson were not makers of a note, but payees of one. They were joint indorsers, but

there had been no payment of the note, as will more clearly appear hereafter. Their relations continued the same as to all the parties who succeeded to the ownership of the note through their indorsement.

If Forbes (when this name simply is used herein, reference is always made to the defendant) should become the owner of the note by indorsement from Forbes Bros., we do not see why Robinson would not be liable to him on the written instrument. Forbes might have maintained an action in some way either at law or in equity by himself or through the agency of another, on the note against Robinson, and we do not see why the action would have been barred in less than four years. It would still have been an action on a written instrument, not barred in less time than the period above stated.

It makes no difference that Forbes could not have maintained an action *at law* against Robinson and himself on the note (and they must have been parties to the action as they were joint indorsers), by reason of the fact that Forbes could not sue himself. Under what is styled the common law system of procedure, he (Forbes) could not have maintained an action at law, but he could have maintained his suit in chancery. He could have set forth the facts in a complaint, and if he was on such facts entitled to a judgment, the Court would be bound to grant it to him. (*White* v. *Lyons*, 42 Cal. 282.) In the case just cited the rule is thus stated: "Under the Code there is but one form of action in this State, and if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action, If the facts stated are such as address themselves to the equity side of the Court, the appropriate relief will be granted by the Court, sitting as a Court of Equity. On the other hand, if the facts alleged are purely cognizable in a Court of law, the proper relief will be administered in that form of proceeding. But a complaint which states a sufficient cause of action, either at law or in equity, is not demurrable as not stating facts sufficient to constitute a cause of action." (See *Wiggins* v. *McDonald*, 18 Cal. 126, and *Carpentier* v. *Brenham*, 50 Cal. 551–2.)

The language just quoted, we understand to lay down the correct rule on the subject, and is in accordance with the rulings of the Courts of New York, under the system of procedure long ago adopted in that State, by which, like the system in this State, one form of action is established. (See

Pomeroy's Rem. and Rem. Rights, pp. 81-2-3, etc., and notes, where the cases are cited and commented on. See also Story's Equity, Secs. 679, 680, 681.)

Forbes Brothers could transfer the title to this note to the plaintiff, unless there appears in the case an inhibition raised by law.

It will be observed that the Court determined as conclusions of law that the joint payees of the note—Forbes and Robinson—indorsed and delivered it to Forbes Brothers; that on the first day of January, 1877, by the dissolution of the copartnership of Forbes Brothers, the note and mortgage became the individual property of Alexander Forbes, and on the 23d of March, 1877, Forbes was the owner and holder of the note, that from Alexander Forbes individually holding the note after the dissolution of the firm of Forbes Brothers, it must be presumed that he paid the note at the time of dissolution.

Certainly the first proposition stated as a conclusion of law that the joint payees of the note indorsed and delivered it to Forbes Brothers, is not a conclusion of law, but a fact, and had already been found as a fact. The other propositions stated as conclusions of law, are not of any law which will stand the test of investigation.

How, merely by a dissolution of copartnership, a note belonging to the firm becomes by law the property of one member of it, we cannot perceive or understand. The same is true of the last proposition, that because Alexander Forbes individually held the note, that there is a presumption that he had paid it.

If the propositions above stated are matters of fact, we do not find the two latter sustained by the evidence. There is no evidence that the title to the note ever vested in Forbes, and we know of no presumption authorized either by law or fact, that Forbes has paid the note, because he at any time held it individually.

We cannot perceive that when it is said that Forbes held the note individually, anything more is meant than that he had it in his individual possession, and this is as compatible with the firm of Forbes Bros. being the owners as A. Forbes. In fact, it is more in accordance with the other facts found, that Forbes Bros. owned the note, because it nowhere appears that they ever indorsed or delivered it to any one, or that title ever passed out of them in any way, until indorsed to the plaintiff. Further, any inference or presumption of ownership by A. Forbes is entirely rebutted by the other facts found, viz: that the note was indorsed to, and became

the property of Forbes Bros., and there is no evidence that the ownership ever passed out of them but by the indorsement to the plaintiff. Forbes had the right as partner to indorse it in the name of Forbes Bros. to the plaintiff (for the purpose of collection), to enable the plaintiff to bring an action on the note. If the note had been his individual property by assignment to Forbes Brothers, he had a right to indorse it to the plaintiff. Admitting that Forbes had acquired the possession of the note by a payment of the amount due on it to the indorsees, Forbes Bros., we see no legal impediment to his indorsing it, either in his own name or in the name of Forbes Bros., to the plaintiff, especially, as it appears that A. Forbes, after the dissolution of the partnership carried on business in the name of Forbes Bros. It makes no difference that the plaintiff paid nothing for the note. Forbes had the right to indorse it to him, whenever the note became his property. He held it with the same right as any other owner had. When he acquired it from Forbes Bros. he had the right to have it indorsed by that firm in their firm name, and to write over their names an indorsement to himself or any other person.

We cannot understand that there is anything in the relation Forbes bore to Robinson, as a joint payee, that would take away this right from him. By paying Forbes Bros. the amount due thereon on the note, he became its owner, with all the rights of ownership, and could transfer that ownership as any other owner. If he paid the money to Forbes Bros., it does not appear that he used any money of Robinson's to pay it with, and there is no evidence tending to prove nor is there any principle of law making Forbes Robinson's agent in paying the amount due on the note to the indorsee, with his own funds, by which such payment inured to the benefit of Robinson, and make Robinson his debtor on an implied assumpsit for money lent.

What is meant by Forbes' paying the note at the time of dissolution? The note had not matured at that time and did not mature for months after that event. The dissolution was on the 1st of January, 1877, and the note matured on the 23d of March following. What is meant by his paying the note at any time? Certainly, not that he paid it for the makers, Weston and Boushey. If this was done, the note would have ceased to exist and no action could have been maintained on it against Weston and Boushey. The Court did not mean any such thing, for it rendered judgment on it against Weston, Boushey and Forbes. It could only mean then that Forbes paid the amount due on it to his in-

dorsees, Forbes Bros., took it up and became the owner of it. If this was the case, we have stated what would be the legal result of such conduct.

There is no evidence, in our judgment, that Forbes ever paid the amount due on the note to Forbes Bros. The facts show that he is using a lawful means to collect the amount due on the note for Forbes Bros.

We think that the plaintiff is entitled to maintain the action brought on the note against Robinson, and to judgment against Robinson as well as Forbes for the amount due on the note. Should Robinson be compelled to pay more than his proportion of this indebtedness, he has recourse to Forbes for what he has been compelled to pay, and we see nothing which will prevent his recovery being effectual. It is not averred that Forbes is insolvent, nor is there any evidence that such is the fact. There is nothing in the cause which would justify us in holding that Forbes should lose his recourse against Robinson for this money, and that the burden of paying the whole of it should be cast on Forbes.

The admission of the record of the suit *Forbes* v. *Weston et al.*, and the letter of Forbes to Robinson, was of matters which did not affect injuriously the plaintiff in this case. They show nothing adverse to plaintiff's right to maintain this action. The Court erred in holding that the action was barred as to Robinson.

Judgment and order reversed and cause remanded for a new trial, in accordance with the views above expressed.

We concur: Myrick, J., Sharpstein, J.

IN BANK.

[Filed November 5, 1883.]

No. 7804.

DERBY ET AL, RESPONDENTS, *v.* STEVENS ET AL., APPELLANTS.

CORPORATION—STOCKHOLDERS—ACTION—JURISDICTION—COURT. Under the former Constitution, to bring a case under Section 322 C. C. within the jurisdiction of the District Court, a plaintiff had to challenge as due to him $300 or more from one or more, or all of the defendants separately.

ID. If the creditor demanded a judgment for more than $300 against one of the defendants only, the District Court had jurisdiction only to render a judgment based upon such demand—a demand for judgment against the particular defendant.

COSTS. There is no authority for the joint judgment for costs against all the defendants. The action is for the recovery of "money or damages," and plaintiff has recovered no judgment, joint or several, for $300 or over (C. C. P., 1022). Plaintiff was not entitled to any costs.

Appeal from Superior Court, San Francisco.

E. B. & J. W. Mastick and *H. A. Powell* for respondents.
Curiis H. Lindley for appellants.

MCKINSTRY, J., delivered the opinion of the Court:

From the moment a debt is created by a corporation, each of the then stockholders becomes primarily liable for his proportion of such debt. Neither by the Constitution, nor by any statute, are the several stockholders made jointly liable to each of the creditors of the corporation. Section 322 of the Civil Code authorities two or more separate actions to be united in one, but the issues to be joined between the plaintiff and each of the defendants are separate, and may be very different, and by the express language of the section a several judgment must be rendered as between the plaintiff and each of the defendants.

The present action was brought in the District Court.

The sixth section of Article VI of the Constitution of 1849, as amended in 1862, provided: "The District Courts shall have original jurisdiction * * * in all cases at law * * * in which the demand exclusive of interest * * * amounts to $300," etc.

Under the former Constitution, to bring a case under Section 322 of the Civil Code within the jurisdiction of the District Court, a plaintiff had to challenge as due to him $300, or more, from one or more, or all of the defendants, separately. A *demand* supposes a tribunal or person on whom it is made; the demand spoken of in the Constitution is a demand for judgment, evidenced by the prayer of the complaint and a statement of facts which can uphold the judgment prayed for. If a stockholder's proportion of a certain debt is less than $300, and the creditor sues the stockholder for such proportion, the former does not demand a judgment against the latter for $300 or more. If the creditor shall unite as defendants other stockholders, the proportion of each of whom is less than $300 the creditor does not demand a judgment of $300 or more against the defendants severally, nor does he demand (under Section 322 of the Civil Code he is not authorized to demand) a judgment for $300 or more against the defendants jointly. In such case the plaintiff does not pretend to demand a judg-

ment against any one for $300 or more; he demands a several judgment against each of the defendants in a sum less than $300. If the creditor demanded a judgment for more than $300 against one of the defendants only (as in the case before us), the District Court had jurisdiction only to render a judgment based upon such demand—a demand for judgment against the particular defendant.

The section of the Civil Code does not purport to provide that the actions therein authorized may be brought in the District or Superior Court, without regard to the judgments demanded; it provides that certain actions may be brought. The matter of jurisdiction is left intact, and a party proposing to bring the suit must select the appropriate forum. If he demands a judgment against one of the stockholders, defendants, or a several judgment against more than one, for $300 or more, the Superior Court has (as the District Court had) jurisdiction to render a judgment against such defendant or defendants. If in the same action he demands a judgment for less than $300 against any of the defendants the Superior Court has no jurisdiction to enter a judgment in plaintiff's favor against those defendants of whom he has so demanded less than $300.

But when the plaintiff has demanded $300 or more as against any defendant, the District Court had, and the Superior Court has jurisdiction to enter a judgment for less than $300 against such defendant.

The action should have been dismissed as to all the defendants except H. W. Thomas, and a judgment entered against Thomas for $280 65–100.

Whether the judgments be or be not valid as against the defendants, other than Stevens or Thomas, inasmuch as Stevens alone has appealed, we are only required to order that the judgment be reversed as to defendant Stevens.

There is no authority for the joint judgment for costs against all the defendants. This action is for the recovery of "money or damages," and plaintiff has recovered no judgment, joint or several, for three hundred dollars or over. (C. C. P. 1,022.) Plaintiff was not entitled to any costs. It is not necessary to decide whether, in case he had recovered several judgments against two or more of the defendants, plaintiff would have been entitled to full costs against each or whether the Court could divide the costs.

Judgment reversed and cause remanded with direction to the Court below to enter judgment in accordance with the views herein expressed.

We concur: Ross, J., Morrison, C. J., McKee, J.

DEPARTMENT NO. 2.

[Filed October 30, 1883.]

No. 9277.

CASSIDY, PETITIONER, v. SULLIVAN, RESPONDENT.

PROHIBITION—TRIAL BY JURY IN DIVORCE CASES. Art. 1, Sec. 7 of the Constitution, which reads: "The right of trial by jury shall be secured to all and remain inviolate," does not apply to divorce cases. It applies only to cases where the right of trial by jury existed at common law.

Mandamus.

By the COURT:

This is an application for a writ to compel the respondent, Judge of the Superior Court, to have the issues of fact, in a divorce case pending in said Court, tried by a jury. The clause of the Constitution mainly relid on reads as follows: "The right of trial by jury shall be secured to all and remain inviolate." (Const., Art. 1, Sec. 7.) This implies the existence of the right. To secure is not to create or acquire, but "to make safe; to relieve from apprehension of, or exposure to, danger; to guard, to protect."—*Webster*. Under the provisions of other Constitutions and statutes quite as broad as the clause above cited, it has uniformly been held that the right to trial by jury was not intended to be extended to cases in which the right did not exist at common law. And the counsel for petitioner concedes that this has become too well established as to equity cases to admit of a change of the rule in that respect by the Courts.

But the counsel insists that an action of divorce is not a case in equity, and cites the clause of the Constitution which confers jurisdiction on Superior Courts to show that actions of divorce are mentioned separately, as if they were different and distinct from cases in equity. Admitting all that he claims in this respect, it by no means follows that the right of trial by jury is given in divorce cases. The right is denied in equity cases, not because they are equity cases, but because no such right ever existed in equity cases; and by parity of reasoning it should be denied in divorce cases because no such right ever existed in divorce cases. In *Koppikus* v. *State Capital Commissioners* (16 Cal. 248), the Court, Field, C. J., delivering the opinion, said: "The provision of the Constitution, that 'the right of trial by jury shall be secured to all,

and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. * * * It is in this common-law sense that the language has always been regarded by the Courts of this State. It is a right 'secured to all,' and inviolate forever, in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several States of the Union. It is a right, therefore, which can only be claimed in actions at law, or in criminal actions where an issue of fact is made by the pleadings. It is, therefore, quite immaterial whether an action of divorce be a case in equity or not, so long as it is a case in which the right of trial by jury did not exist at common law, or otherwise, the clause of the Constitution relied on does not apply to it.

Application denied.

DEPARTMENT No. 2.

[Filed October 29, 1883.]

No. 7648.

DOERFLER, RESPONDENT, *v.* SCHMIDT, APPELLANT.

Appeal from Superior Court, Alameda County.

Thos. Watt for respondent.
H. S. Mulford for appellant.

By the COURT:

The proof of service of the summons was insufficient. *Maynard* v. *McCrellish*, 57 Cal., 355, was decided upon a similar state of attempted proof. The statement in the affidavit used on the motion to set aside the default cannot be deemed a waiver of the service. We cannot look beyond the judgment roll for the purpose of ascertaining the validity of the judgment.

It is argued that the complaint does not state facts sufficient to constitute a cause of action, in that he does not aver a delivery of the deed. We think the point is well taken.

Judgment and order reversed and cause remanded for further proceedings.

IN BANK.

[Filed November 5, 1883.]

No. 8590.

IN THE MATTER OF THE ESTATE OF PHILIP G. MARREY, DECEASED.

APPEAL—EXECUTOR—CLAIM. Appeal of executor from a decree of settlement and distribution dismissed. He cannot in any case litigate the claim of one legatee as against the others at the expense of the estate.

ID. *A fortiori* when he himself is the legatee whose claim he is attempting to maintain, at the expense of the estate, in his capacity of executor.

McKINSTRY, J., delivered the opinion of the Court:

The appeal of the executor from the decree of settlement and distribution must be dismissed. He cannot, in any case, litigate the claim of one legatee as against the others at the expense of the estate. (*Bates* v. *Ryberg*, 40 Cal. 466.)

A *fortiori* when he himself is the legatee whose claim he is attempting to maintain, at the expense of the estate, in his capacity of executor.

Appeal dismissed.

We concur: Ross, J., Myrick, J., Sharpstein, J.

DISSENTING OPINION.

I dissent. In my judgment the appeal is taken by the legatee, and not by the executor. The legatee and the executor are one and the same person. The notice of appeal is as follows:

"You will please take notice that Roderigo Wilkinson, the executor of the last will and testament of Philip Gonzalez Marrey, hereby appeals to the Supreme Court of this State from the decree of settlement and distribution of said estate therein made and entered in the said Superior Court on the 30th day of June, A. D. one thousand eight hundred and eighty-two."

As I read this notice, the words "the executor of the last will and testament of Philip Gonzalez Marrey," following "Roderigo Wilkinson," are merely descriptive of the individual as the same person who was the executor of the last will and testament of the testator named, and does in no manner signify that he appeals in his capacity as executor. The construction that the appeal is taken by Wilkinson as executor, appears forced and is not justified by the words used. In a question of doubt the rule *Benignae faciendae sunt interpretationes propter simplicitatem laicorum ut res magis*

valeat quam pereat applies, a rule that has been applied to a great variety of documents. (See *Roe* v. *Tranmarr*, Willes, R. 682, and notes to this case in 2 Smith's Lead. Cas. 511, 515; Broom's Leg. Max., pp. 521–2, etc.,) and we see no reason why it should not apply to a notice of appeal. Under the benign operation of this rule, the appeal is not allowed to perish but is preserved. THORNTON, J.

I concur: McKee, J,

IN BANK.

[Filed November 5, 1883.]

No. 10,874.

EX PARTE BENNINGER.

ORDINANCE—SAN BERNARDINO. The objections to the so-called "liquor license law," adopted by the Board of Supervisors of San Bernardino, that it was adopted at a time when the Board was not legally in session, and that it is unreasonable and oppressive and in restraint of trade, are held untenable.

ID. Section 22 of the "County Government Act" did not put an end to the May session of the Board which was legally commenced and continued under Section 4032, Political Code. It is not so inconsistent with the last-mentioned section as to annul a meeting legally existing at the time it went into effect.

Appeal from Superior Court, San Bernardino County.

Byron Waters and *H. M. Willis* for petitioner.

By the COURT:

The petitioner is in custody under a warrant of arrest duly issued upon a complaint charging him with a violation of a certain ordinance adopted by the Board of Supervisors of San Bernardino County, which he claims to be void.

The ordinance is said to be void for two reasons: first, because adopted at a time when the Board was not legally in session, and, secondly, for the reason that it is unreasonable, oppressive and in restraint of trade. It was adopted pursuant to the Act of the Legislature approved and which went into effect March 13, 1883. (Stats. 1883, p. 297.) At that time Section 4032 of the Political Code read: "The regular meetings of the Boards of Supervisors must be held at their respective county seats on the first Mondays in May, August, November and February of each year, and must continue from time to time until all the business before them is disposed of. * * *" Pursuant to this authority

of law the Board of Supervisors of San Bernardino County met in regular session on the 7th day of May, 1883. Not concluding its labors on that day, it adjourned until the next, and so on to and including the 16th day of May, on which day the ordinance in question was adopted. We do not understand counsel to deny that the Board was legally in session on the 16th of May, unless it be that it was deprived of the power to act by reason of Section 22 of the Act commonly called the County Government Act, which, it is said, went into effect on the 14th of May. That section reads: "The Board of Supervisors must by ordinance provide for the holding of regular meetings of the Board at their respective county seats." We do not think this section put an end to the May session of the Board, which was legally commenced and continued under Section 4032 of the Political Code. It is not so inconsistent with the last mentioned section as to annul a meeting legally existing at the time it went into effect. Nor do we think the provisions of the ordinance come within the rule that would justify us in declaring it void because unreasonable, oppressive or in restraint of trade.

Writ dismissed and prisoner remanded.

IN BANK.

[Filed October 12, 1883.]

No. 10,821.

THE PEOPLE, RESPONDENT,
v.
GEORGE A. WHEELER, APPELLANT.

Appeal from Superior Court, San Francisco.

Attorney General for respondent.
C. H. Wolff for appellant.

By the COURT:

This cause was submitted without oral argument, no points or authorities being on file. Leave was granted to file briefs within a specified time, which time was extended. Such extension of time has expired, and no briefs, points or authorities have been filed. We therefore have not had the aid of counsel in the examination of the case. We have, however, carefully examined the transcript, and we find no error.

The judgment and orders appealed from are affirmed, and the cause is remanded for further proceedings according to law.

DEPARTMENT NO. 1.

[Filed November 7, 1883.]

No. 8956.

HARVEY, RESPONDENT,

v.

FOSTER AND KRAFT, APPELLANTS.

SHERIFF—ATTACHMENT—EXECUTION—SURPLUS. The action was against defendants (Foster, Sheriff, and Kraft, mortgagee), to recover a surplus remaining after satisfaction of Kraft's foreclosure decree, under which Kraft purchased the premises. It was alleged that, by collusion between Foster and Kraft, the latter retained such surplus. Before foreclosure proceedings an attachment suit had been commenced by plaintiff against the mortgage debtor, Logan, and levied on the mortgaged land. After foreclosure decree, plaintiff obtained judgment, execution issued, and as to nearly all of it defendant, Sheriff, returned the execution unsatisfied. On the trial of this action objection was made to plaintiff's affidavit for attachment against Logan, as having been insufficient. *Held* the lien of the attachment was valid as against defendants.

ATTACHMENT—AFFIDAVIT. Whatever irregularities may exist in the proceedings of an attaching creditor, other attaching creditors cannot make themselves parties to those proceedings for the purpose of defeating them on that account.

ID. Any irregularities in obtaining an attachment are waived by the defendant to the action when he appears and answers, without the taking advantage of them by motion or otherwise, in the course of the proceedings.

SHERIFF—ACTIONS AGAINST. A Sheriff cannot make any defense inconsistent with his return. He is concluded by his return when it is set up by any party who may claim something under it.

ID. Where at a judicial sale property brings more than the amount of the execution, if the officer fails to pay the excess, or see to it that it is paid to the defendant, he and the sureties on his official bond are liable in an action of debt at the suit of the defendant for the excess.

ID. An action may be maintained by the execution creditor for money collected by the Sheriff upon an execution.

ID. Statutory remedies are cumulative, and leave the common law remedies unimpaired.

FINDINGS. As the answer consists only of general and specific denials of the averments of the complaint, the finding "that all the allegations of the plaintiff's complaint are true" covers all the issues of fact.

Appeal from Superior Court, Tehama county.

Chadburne and *Ellison* for respondent.
Cadwalader and *Chipman & Garter* for appellants.

McKINSTRY, J., delivered the opinion of the Court:

As the answer consists only of general and specific denials of the averments of the complaint, the finding "that all the

allegations of the plaintiff's complaint are true" covers all the issues of fact.

The attachment affidavit filed by plaintiff in the action *Harvey* v. *Logan* stated that the indebtedness from the defendant to the plaintiff therein had not been secured by any mortgage or lien, "*or*, if originally so secured," such security had become valueless. The affidavit fails to state the *amount* of the indebtedness due from Logan to Harvey. (C. C. P., 540).

If the defendant in the action, *Harvey* v. *Logan*, had moved to dissolve the attachment, it would have been the duty of the Court to have ordered the attachment to be dissolved. (*Wilke* v. *Cohn*, 54 Cal., 212; *Hawley* v. *Delmas*, 4 *id.*, 195). But the lien of the attachment was valid as against the present defendants.

Fridenberg v. *Pierson*, (18 Cal., 152), was a bill in equity alleging that both plaintiff and defendant were attaching creditors, the defendant's attachment (upon insufficient affidavit), having been first issued and levied, and prayed that the defendant's attachment be set aside in favor of the plaintiff. The Court held that the bill could not be maintained, citing Drake on Attachment, Sec. 771: "Whatever irregularities may exist in the proceedings of an attaching creditor, it is a well settled rule that other attaching creditors cannot make themselves parties to those proceedings, for the purpose of defeating them on that account." *Hawley* v. *Delmas*, (4 Cal., 195), was an appeal from an order quashing an attachment. So also was *Wilke* v. *Cohn*. (54 *id.*, 212). In *Porter* v. *Pico* (55 *id.*, 173), it was said: "Any irregularities in obtaining it (the attachment) were waived by the defendant to the suit when he appeared and answered, without taking advantage of them by motion or otherwise in the course of the proceedings. The process is merely auxiliary and the judgment in the action cures all irregularities." The transcript shows that in the action *Harvey* v. *Logan* the defendant appeared, etc. If the transaction connected with the sale under the mortgage decree could be held to constitute Kraft, the mortgagee, successor in interest to Logan's statutory right of redemption, he acquired by it no right to attack the lien of the attachment, since Logan had none. (Drake on Attachment, Secs. 87, 112, 124, 143, 185, 273).

The Sheriff's return to the order of sale shows that he received at the mortgage sale the sum of $15,753 cash. He cannot make any defense inconsistent with his return. (Freeman on Executions, 450; *Ferguson* v. *Tutt*, 8 Kans. 370.) A sheriff is concluded by his return when it is set up by any

party who may claim something under it. (Crocker on Sheriffs, 46).

Where at a judicial sale property brings more than the amount of the execution, if the officer fails to pay the excess, or see to it that it is paid, to the defendant, he and the sureties on his official bond are liable in an action of debt at the suit of the defendant for the excess. (*State* v. *Noel*, 5 Ired., 357.) And an action may be maintained by the execution creditor for money collected by the Sheriff upon an execution. (*Nelson* v. *Kerr*, 59 N. Y., 224; *Helms* v. *Wilson*, 18 Ala., 650.) Statutory remedies are cumulative, and leave the common law remedies unimpaired. (Freeman on Ex., 488.)

In the case before us the plaintiff has shown that he is entitled to receive from the Sheriff the excess of the proceeds of the sale beyond the amount of the sale, costs, etc. Upon principle he should recover in an action against the Sheriff; and under the peculiar facts pleaded and proved, he was justified in joining Kraft as defendant.

Judgment and order affirmed.

We concur: McKee, J., Ross, J.

Superior Court of the City and County of San Francisco, State of California.

DEPARTMENT No. 6.

JAMES M. BRAZELL, *Plaintiff*, *v.* GEO. R. WELLS, JAMES C. FLOOD ET AL., *Defendants*.

No. 9622.

Where B. W. & H. went to Nevada to examine a mine, with the verbal understanding that if they liked it and could get a bond on it, they would be equally interested, and after examining and reporting this mine, H. and one S. went to view another mine while B. and W. took the train for Virginia City, but hearing of the Mt. Cory mine, stopped off and examined it and got a verbal offer from the owners to sell them the mine for $16,000.00, within fifteen days, which offer they did not accept, and W. then proposed to B. that he (W.) would endeavor to get F. to buy the mine and carry them an interest, which was acceded to by B., and W. thereupon procured F. to buy the mine with his own funds and carry him (W.) a fourth interest, but with

the verbal understanding between W. & B. that the latter was to be equally interested with him in the one-fourth on payment of his share, $2,000 of the purchase money: *Held*, that this did not create a partnership between B. and W. nor a trust in B's favor which Equity could enforce,

McKoon & Towle and *William H. Sears* for plaintiff.

Mesick & Maxwell, *W. H. L. Barnes* and *D. M. Delmas* for defendants.

Oral opinion of JUDGE EDMONDS delivered in open Court, November 20th, 1883, on decision of the motion to dissolve the injunction.

This is a motion to dissolve an injunction. The argument in the case commenced on Friday, and continued on Saturday, Monday, Tuesday and Wednesday, of the following week.

The case is an important one and arises out of an alleged contract of partnership between the plaintiff, Brazell, and George R. Wells. Suit was commenced to dissolve this partnership, to reach property in the hands of third persons and establish a trust in favor of the partnership arising out of the transactions set forth in the complaint. An injunction was granted on the complaint; afterwards the complaint was amended so as to include a corporation to which this property had been conveyed, and the injunction was made to include the corporation and restrain a sale of the property. On the coming in of the answers of the defendants, they moved to dissolve this injunction upon the pleadings and upon the deposition of the plaintiff, Brazell, taken on behalf of the defendants. The plaintiff seeks to sustain his bill by additional affidavits, of which a large number were read on the hearing, but plaintiff's case should stand or fall upon his own testimony, which, for the purposes of this motion, I take to have stated the facts substantially as they took place.

The property consists of a mine—the Mount Cory Mine in the State of Nevada, said to be very valuable, and alleged to be worth $10,000,000 and upwards; which mine was purchased by James C. Flood, in the name of George R. Wells, a conveyance then taken by Flood, and by Flood conveyed to the Mount Cory Mining Co.

We are met at the outset of the investigation in this case with a difficulty arising out of the Statute of Frauds, as the contract of partnership was by *parol*—all the contracts between the parties were by *parol*. If this trust which it is

sought to have established, can be held to arise, it must arise out of the transactions between the parties—not out of the contract. A Court of Equity lays hold of the transactions of the parties and establishes a trust in favor of a party who is in Equity entitled to the land although the legal title is in the name of another, but in such case where the contract is by parol it does not undertake to treat the contract as valid and could not do that any more than a Court of Law, in the teeth of the Statute which declares it invalid, but it holds the trust to arise out of the transactions between the parties.

Thus, where land is purchased in the name of A. and the purchase-money is paid by B. a trust is held to result in favor of B., and where B. pays only a part—as one-half or one-fourth of the purchase-money, a trust results in his favor *pro tanto*. So where the party making the purchase—taking title, I should say, in his own name, himself advances the purchase price out of his own funds, but by way of loan to the other party, a trust is held to result in like manner to the party for whom the purchase was made, equity treating him as the party who pays the purchase price, he being responsible to the other for the consideration; the trustee in such case having a lien of course upon the land for his advances. So, where there is an existing partnership and lands are purchased with the *partnership funds* by both or one of the partners and the title is taken in the name of one, a trust results in like manner to the firm, to the partnership, and the land is treated in equity as partnership property, and dealt with accordingly. But, it is claimed that the rule goes further and that it is competent to establish a partnership between the parties by parol, and that when that fact is established equity will treat lands purchased by either partner, though with his own money, as partnership property, and deal with it accordingly; that the contract of partnership is an exception to the general rule in regard to parol contracts, and once established, though by parol, equity is to treat it precisely the same as though it was in writing, and without regard to the question whether or not the land was purchased with the partnership funds. There are a few cases which seem to go to that length, but those cases I will not undertake to discuss, on the decision of this motion. I hold the rule to be otherwise. I think the weight of authority is decidedly the other way, and still, if the case turned alone upon this question, I should feel strongly inclined to continue this injunction in order that the question might be taken to the Supreme Court and settled by the Court of last resort.

But passing that question, let us see if in this case there was any contract of partnership between these parties—Brazell and Wells—for if there was no such contract, the plaintiff's case must fall, and this suit will have to be dismissed, as it is a suit brought to dissolve a partnership. As I said, the plaintiff's deposition has been taken, and therefore on the decision of this motion the Court will treat the case precisely as though it had been tried and a motion for a non-suit were made upon the plaintiff's own testimony. The plaintiff cannot ask for anything fairer than to have the case determined upon his own statement under oath. The facts as detailed by him are substantially these: Brazell, Wells and one Humbert, were intimate friends in the city of San Francisco, all having something to do with mines. In the summer of 1882, in the latter part of May, these three went to Nevada, partly for the purpose of a vacation and recreation, and partly with a view of looking out for mining properties. Wells had received a letter from a friend of his, one Ernst, giving a somewhat glowing account of a mine in Nevada in which Ernst was interested, desiring Wells to come up and look at it. This letter was shown by Wells to Humbert and Brazell. After some talk between them it was agreed that they should go to Nevada together and look at this mine, and that if they liked it and could get a bond upon it they three would be equally interested in whatever resulted therefrom. They went. They saw the mine. They did not like it. They rejected it. On their way from the mine, I think at Luning, they met one Hank Smith, another mining expert I believe, who was also out upon the same lay, and they four agreed to go and look at another mine called the Lotta. Then it was understood between them that if anything came out of it they four should be equally interested. They went and were refused permission to see the Lotta and returned. The next day Smith and Humbert got permission to go into the Lotta. Brazell and Wells took the train to Virginia City. On their way they heard of this Mount Cory mine, and were induced to stop over at Hawthorne for the purpose of seeing some specimen samples which Stoner, a hotel keeper at Hawthorne, had on view. They saw Stoner and the samples and were induced to go and see the mine. They liked it and endeavored to get a bond upon it, but the owners refused to bond the mine and they came away. One of the owners did say before they left, that if they could make their arrangements before the 15th of June to pay the price they asked for the mine he would consider it a sale. This offer was not ac-

cepted. When they got back to Hawthorne they saw Stoner again who, it seems, had some sort of verbal authority from the owners, and Stoner told Brazell substantially that they could have the mine for $16,000, $15,000 for the owners and $1,000 for himself as a commission, at any time before the 15th day of June. This offer was not accepted, but Brazell said they "would see," meaning that they desired to have some assays made; they had taken samples of the ore and were going to have assays made. They left for Virginia City, and on their way Wells suggested to Brazell that he thought he could get Flood to buy this mine and carry them an interest, but the mine had to be examined and passed upon by McKenzie. He further suggested that this was their "pigeon," to use his own language, and he did not desire Smith and Humbert to have any interest in it. They had some discussion over that. Brazell did not think it quite fair, or a matter of policy to leave Smith and Humbert out, and it does not seem to have been settled between them whether Smith and Humbert were to have a part of the "pigeon" or not. Neither does it ever appear to have been settled quite between them by any agreement or arangement or understanding. They came home to San Francisco and Wells did induce Flood to send McKenzie to examine the mine. McKenzie made a favorable report, and Flood bought the mine with his own money, for his son and for McKenzie and Wells. I am stating these facts as strongly as they will bear in favor of the plaintiff. Before the mine was purchased, Wells saw Brazell and told him that Flood was going to purchase the mine for his son and give him a one-half interest, and give McKenzie one-quarter and he, Wells, another quarter of the mine. Wells was then just on the point of going up to Nevada to complete the purchase, when he told this to Brazell, and he said "Brazell, we will have to put up some money on this," and asked Brazell if he could raise $2,000, which would be his share of that division. Brazell said he could, and they parted. Wells went to Nevada and completed the purchase, taking the title in his own name and immediately conveying to Flood who, as I said, soon after conveyed to the Mount Cory Mining Co.

Now, where several persons agreed together to go out prospecting for quartz, and to be equally interested in whatever mines they or any of them might discover and locate, and one of the number located a mine in the name of himself and his associates, it was held by the Supreme Court of this State,

in *Gore* v. *McBrayer* (18th Cal. 583) that the parties held the mine as *tenants in common* and not as partners; that the arrangement between them did not constitute either a general, or a mining partnership; and I think the result of all the authorities in this State to be, that such a transaction does not of itself constitute a partnership, but there must be something more; as where the owners of the mine work it—unite and co-operate in working or developing the mine together, that constitutes a mining partnership; or they may by agreement constitute themselves general partners, both in the mine and in the profits derived from working it; and I take it that it makes no difference that the mine is not acquired by discovery and location but by purchase. In this case there was no agreement to *work* the mine. The agreement between the parties, as alleged in the complaint and detailed by Mr. Brazell, did not look to working, or spending money on the mine in working or developing it, but simply to its *acquisition*. And if Brazell and Wells had actually acquired this Mount Cory mine, with their *own* funds and in their joint names, they would not under this agreement have been partners in the mine, but simply tenants in common. Again, they did not pay for the mine, either with their individual money, or with any partnership funds. There were no partnership funds. It was contended on the argument that this verbal option to purchase was to be treated as partnership funds—as a bond we will call it, voidable because not in writing, but which, inasmuch as the mine owners did not repudiate it, but consented to convey, or complete the contract, might be treated the same as though it were in writing; and the argument is, if this had been in writing and sold and disposed of by the co-partnership to Flood, it might by a stretch of reasoning be treated as partnership funds, which paid for the mine.

If the offer had been accepted there might have been more force in the argument, but there was no acceptance of the offer and consequently no contract, not even a verbal one, between this firm, so called, and the owners of the mine. The firm, therefore, had nothing of value that could in any sense be called partnership funds or property. The case which is decisive on this point is *Ehle* v. *Judson*, (24 Wend. 97), a precisely similar case in this respect.

So, leaving out all the other parts of the narrative, the sole transaction from which this trust could be said to arise is the conversation which took place between Wells and Brazell on the cars coming home, when Wells suggested to Brazell that he thought he could get Flood to purchase this

mine and carry them an interest. There is no contract of partnership arising out of that transaction, and I see no possible way in which a Court of equity can impress a trust on this property held in the name of Flood or in the name of this corporation, or in which it could have impressed a trust in favor of Brazell, if Wells himself had purchased, and obtained the title in his own name and with his own funds.

I shall therefore have to grant this motion to dissolve the injunction, and I grant it upon the ground that it appears from the plaintiff's own deposition that there was no contract of partnership between him and Wells.

In open Court, November 20th, 1883.

Abstracts of Recent Decisions.

WILL—RULES FOR CONSTRUCTION. In the construction of a will the following are three cardinal canons to ascertain and give effect to the intent of the testator. First, regard must be had to the whole scheme of the will, and if it is found that a particular intent is inconsistent with the general intent, the former must give way to the latter; second, the order in which words are placed is not to be considered exactly, if a different arrangement will better answer the apparent intent of the testator; third, no presumption of an intent on the part of the testator to die intestate of any part of his property is to be made when his words, as found in the will, can be construed to dispose of the whole of it. Ferry's Appeal, S. C. Pa., Feb. 26, 1883; 40 Leg. Int. 295.

ACTION ON ATTACHMENT BOND—ACTION FOR MALICIOUSLY SUING OUT ATTACHMENT. The bond required upon suing out an attachment is conditioned that the plaintiff will pay to the defendant his costs and damages sustained by reason of the attachment, if the defendant recovers judgment. An action upon this bond is *ex contractu*, and the damages are limited to injury sustained by being deprived of the use of the property, or by its loss, destruction or deterioration, together with costs of suit. For all other injuries sustained, the defendant must sue the plaintiff alone in the case. This action is *ex delicto*. Both actions may be brought. The parties, the proof, the damages and the nature of the action are different. (*Hall* v. *Forman*, Court of Appeals of Ky., 2 Ky. L. J. & Rep. 140.)

New Law Publications.

FEDERAL REPORTER, vol. 16 (bound vol.), Robert Destey, Editor, West Publishing Company, St. Paul.

This volume contains all the decisions of the U. S. Circuit and District Courts issued in June and July, 1883.

SUTHERLAND ON DAMAGES (Volume 3): Callaghan & Co., Chicago, Publishers.

We have already favorably noticed this work, on the issuing of the previous volumes. The subjects treated in this last volume are Agency, Insurance, Landlord and Tenant, Carriers, Telegraph Companies, Breach of Marriage, Promise, Ejectment, Injuries to Real Property, Trespass to Personal Property, Conversion, Replevin, Fraud, Slander and Libel, Malicious Prosecution, Seduction, Personal Inquiry. This volume completes the work, and gives the bar a most valuable text book. We have examined it carefully, and speak knowingly in our commendation.

LAW OF FRATERNITIES AND SOCIETIES: By A. J. Hirschl of the Davenport (Iowa) Bar. William H. Stevenson, St. Louis, Publishers.

This book is a compilation of the law relating to Masons, Odd Fellows, Chosen Friends and like orders, as contained in the decisions of the Courts of various States. To those interested in such societies this book ought to be very useful.

TRIAL PRACTICE AND TRIAL LAWYERS. A TREATISE ON TRIALS OF FACT BEFORE JURIES: By J. W. Donovan. William H. Stevenson, St. Louis, Publishers.

This is an extremely readable book, full of interesting anecdotes of great and successful advocates, and replete with wise, practical suggestions drawn from the experience of these eminent practitioners. A work like this is refreshing, after working hours over reports and text books.

ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED: By Irving Browne, Soule and Bugbee, Publishers.

This, in the language of the authors, is a sort of primer of the legal principles relating to the law of Domestic Relations. It is an attempt to present a brief, but comprehensive, summary of the body of this law. To students this work is invaluable. To laymen it would be easy, interesting reading. The author has condensed the law into a convenient shape and has clothed it in simple language and an every-day style. We wish that there were more of just such books.

Pacific Coast Law Journal.

VOL. XII. NOV. 17, 24, AND DEC. 1, 1883. NOS. 13, 14, 15.

Current Topics.

WEST COAST REPORTER.

On January 3d, 1884, Messrs A. L. Bancroft & Co. will issue the first number of the West Coast Reporter, a weekly law journal having for its special features: 1.—The decisions as fast as filed, of the following Courts: U. S. Circuit of California, U. S. District of California, U. S. District of Colorado, U. S. District of Nevada, U. S. District of Oregon, Supreme Court of Arizona, Supreme Court of California, Supreme Court of Colorado, Supreme Court of Idaho, Supreme Court of Montana, Supreme Court of Nevada, Supreme Court of New Mexico, Supreme Court of Oregon, Supreme Court of Utah, Supreme Court of Washington, Supreme Court of Wyoming.

2.—Short and continued editorials on subjects of legal value on this coast and generally. 3.—Notices of new law books. 4.—Miscellaneous notes on legal matters.

It will be seen that the aim of the publishers is to give to their subscribers the opinions in *full* of *five* U. S. Courts and *eleven* States and territories. The scope of this enterprise far exceeds that of any yet attempted on this coast, and will entail great labor and expense. The publishers have secured for their editorial department the services of the well known law writer, John Norton Pomeroy, LL. D. This is indisputable evidence of the well meant purpose to fix a high standard for their magazine. The opinions which will be embraced by the publication will exceed 5000 pages per annum—the decisions of 16 Courts—a library in itself. This work cannot be continued without the aid of every lawyer on the coast. It is an enterprise worthy the support of them all. The publication of a law journal on this coast will admit of no rivalry. Our arrangements with the proprietors of the new journal are entirely satisfactory, and with a view of giving no embarrasment to an undertaking which offers

so much to the bench and bar, we have determined to cease the publication of our Pacific Coast Law Journal during the last week in December, and wish the "West Coast Reporter" a long and successful career.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed November 26, 1883.]

No. 8900.

WINANS, RESPONDENT,

v.

THE SIERRA LUMBER COMPANY, APPELLANT.

CONTRACT—INSTRUCTION. Breach of contract, verdict for plaintiff and appeal by defendant. Judgment reversed because of an unintelligible instruction as to the measure of damages.

Appeal from Superior Court, Tehama County.

Chadbourne and *Ellison* for respondent.

Chipman & Garter for appellant.

ROSS, J., delivered the opinion of the Court:

The plaintiff sued the defendant for breach of a contract alleged to have been made between them in March, 1881, in respect to the manufacture of lumber. The complaint charges that at the time stated the defendant was the owner of two steam sawmills, known as the Champion and Yellow Jacket mills, and of a large quantity of timber lands in the vicinity of the mills—all in Tehama County—together with a lumber yard and planing mill, and also a water flume, extending from the Champion Mill to the lumber yard and planing mill, and was also the owner of a large amount of other property, used in and about the manufacture of lumber. That on or about the 15th of March, 1881, defendant agreed to furnish to plaintiff, to be used by him during the lumbering season of 1881, in manufacturing lumber from the defendant's lands, the aforesaid mills and flume, sixty head of oxen, six horses, all the trucks, chains, etc., pertaining to the mills, all the running gear for necessary tram cars, sufficient strap iron and nails to build a strap iron tramway from the Champion to the Yellow Jacket Mill, and all other property either necessary or convenient for the purpose of manufacturing lumber. The defendant also agreed to furnish to plaintiff, delivered at the town of Red

Bluff, a locomotive engine of a certain stated capacity, suitable and proper to be run and operated upon the strap iron tramway to be built by the plaintiff under the contract—plaintiff agreeing to build a strap iron tramway from the Champion to the Yellow Jacket Mill at his own cost; to operate and use the tramway, mills, flume and milling property during the lumbering season of the year 1881, for the purpose of manufacturing lumber, which plaintiff agreed to do, and to deliver to the defendant—defendant agreeing to pay plaintiff for all lumber manufactured at the said mills during the season of 1881 and delivered at the said yard, $9 per thousand feet, and for all lumber so manufactured and remaining at the mills on the 1st of December, 1881, $8 per thousand feet, and that at the expiration of the season the plaintiff to deliver the possession of all the property, including the tramway, to the defendant. The complaint then charges full performance of the contract on the part of the plaintiff; that the defendant failed and neglected to furnish the locomotive engine it agreed to furnish; that the engine it did furnish the plaintiff was so made and constructed as that it could not be successfully used on the tramway, the plaintiff agreed to, and did, construct; that plaintiff objected to the engine furnished at first and during all the time of its use, and that although often notified that the engine furnished was unsuitable for the tramway and would not work thereon, defendant neglected and refused to furnish one that was suitable, as it agreed to do. That during the entire lumbering season of 1881, the plaintiff made every reasonable effort to successfully use the engine furnished, but by reason of its defective construction and consequent failure to work properly, the plaintiff was prevented from manufacturing at least three and one-half million feet of lumber that he would have manufactured had defendant furnished plaintiff with an engine in accordance with the contract, and that by reason of defendant's failure in that regard the plaintiff was damaged in the sum of thirt-one thousand five hundred dollars.

The answer admitted the making of a contract between plaintiff and defendant at the time and with respect to the matter stated, but put in issue some of the terms of the contract; averred that the contract was for seven million feet of lumber, and no more; averred full performance on its part of the contract as made; that a part of the tramway the plaintiff agreed to build he did not complete at all, and that the other portion of it was constructed with such short and irregular curves and uneven and excessive grades, and in so

unworkmanlike, insufficient and defective a manner, that it could not be successfully worked by him, and was of little value when turned over to defendant at the end of the season; and, in short, that plaintiff's failure to manufacture and deliver all the lumber he agreed to was due to his own fault and not to defendant, by which defendant was damaged in the sum of eighteen thousand dollars, for which it asked judgment by means of a cross-complaint filed in the action.

After trial there was a verdict and judgment for the plaintiff for $10,241, and costs. The appeal is by the defendant. Both sides agree that the engine furnished by the defendant would not work successfully on the tramway built by the plaintiff, but, why, was the question: defendant contending that it was because of the worthlessness of the tramway, and the plaintiff, that it was because the engine was not adapted to a tramway of that kind, and was not the kind of an engine defendant had agreed to furnish.

The Court below instructed the jury:

"If the jury believe from the evidence that the engine furnished by defendant to plaintiff was not of the make and description it had contracted to furnish him, and that the plaintiff duly notified the defendant of the defects in said engine, and of its unfitness for the purposes of said contract, and afterwards, without any default on his part, made every reasonable effort in good faith to accomplish the purposes of said contract, and to prevent loss or injury, but ultimately by reason of defendant's failure to furnish an engine of the kind and make agreed to be furnished, suffered damage, and was prevented from manufacturing lumber, which he otherwise would have manufactured, then the plaintiff is entitled to recover as damages, the contract price for the lumber which he was so prevented from manufacturing, less the expense he would have incurred in manufacturing said lumber, over and above the amount necessarily expended under the circumstances, in manufacturing the amount actually manufactured by him."

We are unable to comprehend the rule of damages laid down by the Court, and it is quite certain the jury could not have understood it. The instruction is clear enough down to the clause "over and above the amount necessarily expended under the circumstances in manufacturing the amount actually manufactured by him;" but the insertion of this clause rendered the instruction unintelligible.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed November 28, 1883.]

No. 10,890.

EX PARTE KELLOGG.

CONTEMPT—REFEREE—EXECUTION. After execution against petitioner was returned wholly unsatisfied, an order was duly made by the Superior Court pursuant to Section 714 *et seq.*, C. C. P., requiring petitioner to appear before a referee, etc. Petitioner subsequently disposed of jewelry he had, in order to evade the process of the referee, and was afterward by the Superior Court adjudged guilty of contempt. *Held*—The Court rightfully adjudged petitioner guilty of contempt, and imposed upon him appropriate punishment. (Citing *Galland* v. *Galland*, 44 Cal., 478; *Myers* v. *Trimble*, 3 E. D. Smith, 612; C. C. P., 128-1209.

Habeas Corpus.

Ross, J., delivered the opinion of the Court.

The petitioner claims to be illegally restrained of his liberty by the Sheriff of the city and county of San Francisco, and seeks to be discharged on *habeus corpus*.

The facts appear to be these: In 1882 one Rankin recovered a judgment in the Superior Court of the city and county of San Francisco against the petitioner and others for the sum of eighteen hundred dollars, or thereabouts, on which execution was issued and placed in the hands of the Sheriff. The execution having been returned wholly unsatisfied, an order was duly made by the Court pursuant to Section 714 *et seq.*, of the Code of Civil Procedure, requiring the petitioner to appear before a referee named, at a time and place specified, to answer concerning his property. Pursuant to that order the petitioner appeared before that referee on the 25th of June, 1883, and his examination was thereupon commenced. Pending the examination an *alias* execution upon the judgment was issued and placed in the hands of the Sheriff. The next day, June 28th, the petitioner and the Sheriff with the execution, again appeared before the referee and the examination of the petitioner continued, during which petitioner testified to his ownership and possession of certain articles of jewelry. Thereupon counsel for Rankin moved the referee for an order directing petitioner to deliver the property to the Sheriff to be applied toward the satisfaction of the execution. The referee took the motion under advisement and continued the further hearing until July 2d, at which time upon the request of petitioner it was further continued until the next day, July 3d.

During this last continuance petitioner delivered the property to one Cassin, to whom he claimed to have been

indebted; and when, on July 3d, he, together with the other parties interested, appeared before the Referee to receive his ruling upon the motion addressed to him, and the Referee had made the order asked, petitioner responded by saying that he could not comply with the order for the reason that he had already turned the property over to Cassin. Upon these facts being brought to the notice of the Superior Court, that Court cited petitioner to appear at a time and place stated and show cause why he should not be punished for contempt in refusing to obey the order directing him to deliver the property to the Sheriff to be applied toward the satisfaction of the execution against him. At the time and place stated in the order to show cause, petitioner duly appeared with his counsel, and answered the allegations against him; whereupon the Court took proof, and from the evidence and papers in the case found the facts already detailed, and further, that the delivery of the property by petitioner to Cassin was at his (petitioner's) own suggestion, and was made in anticipation of and for the purpose of defeating the order Rankin had asked for, and that to accomplish his purpose to defeat the process of the Court petitioner had procured upon his own motion a delay in the proceedings, pending which he voluntarily and contumaciously disabled himself from complying with the order he anticipated being made, and finally that his action "was but a bold attempt to defeat the order of the referee, duly and properly made, and cause the plaintiff's proceedings to be barren of any result." Finding such facts the Superior Court rightly adjudged petitioner guilty of contempt, and imposed upon him appropriate punishment. (Secs. 128, 1209, C. C. P.; *Galland* v. *Galland*, 44 Cal. 478; *Myers* v. *Trimble*, 3 E. D. Smith, 612.)

Writ dismissed and petitioner remanded.

We concur: Myrick, J., Thorton, J., McKee, J.

DEPARTMENT No. 1.

[Filed November 28, 1883.]

No. 8924.

BECKER, RESPONDENT *v.* FERRIER, APPELLANT.

CROSS-COMPLAINT—DISMISSAL—DEMURRER—AMENDMENT. Where a cross-complaint is successfuly demurred to and the cross-complainant fails to amend the pleading within the time allowed, but instead, in open Court, declares her intention to stand upon the pleading as originally filed, an order dismissing such cross-complaint is proper.

Appeal from Superior Court, Santa Barbara County.

B. F. Thomas, for respondent.
Hall & Requa for appellant.

By the COURT:

The Court below rightly sustained the demurrer to the cross-complaint filed by Catherine Ferrier, and the cross-complainant having failed to amend her pleading within the time allowed by the Court, but instead having in open Court declared her intention to stand upon the pleading as originally filed, the Court properly entered an order dismissing it. (*King* v. *Montgomery*, 50 Cal., 116.)

Judgment affirmed.

IN BANK.

[Filed November 28, 1883.]

No. 7766.

FARMERS' AND MECHANICS' BANK OF SAVINGS,

v.

COLBY ET AL.

NOTE—CORPORATION—MAKER. Opinion of Department (XI Pac. C. L. J., 271) adopted by the Court in bank.

By the COURT:

This case was heard in Department One, and an opinion filed therein April 30, 1883, (XI Pac. C. L. J., 271). Subsequently a hearing by the Court in bank was granted, which hearing has been had. We are satisfied with the reasons given and the conclusion reached by the Court in Department; therefore the order is affirmed.

[Filed November 3, 1883.]

No. 10,883.

EX PARTE DAY ON HABEAS CORPUS.

D. H. Regensberger for petitioner.
Alfred Clarke contra.

BEFORE SHARPSTEIN, J.

Writ discharged and petitioner remanded.

DEPARTMENT No. 1.

[Filed November 5, 1883.]

No. 9625.

HART *v.* TIBBETTS.

By the COURT:

The statement on motion for a new trial is not authenticated in any way, and no point is made on the judgment-roll. There is, therefore, no point presented that we can consider.

Judgment and order affirmed.

IN BANK.

[Filed November 5, 1883.]

No. 7279.

McGEARY

v.

THE MUNICIPAL COURT OF APPEALS.

By the COURT:

On the authority of *Davis* v. *Superior Court*, XI Pac. C. L. J., 568, that portion of the judgment appealed from which affirms the judgment in the case entitled *Llewellyn* v. *McGeary*, is here affirmed, and that portion of the judgment appealed from which reverses the judgment in the case entitled *Jackson* v. *McGeary*, is here reversed.

IN BANK.

[Filed September 21, 1883.]

No. 7059.

STORK

v.

THE SUPERIOR COURT OF SAN FRANCISCO.

Writ of Review.

By the COURT:

On the authority of *Davis* v. *Superior Court* (11 Pac. C. L. J., p. 568), the judgment and proceedings of the Superior Court are affirmed.

DEPARTMENT No. 2.

[Filed October 11, 1883.]

No. 8962.

IN THE MATTER OF THE ESTATE OF H. E. HYDE, DECEASED.

ADMINISTRATION—ESTATE—NON-RESIDENT. A Public Administrator is entitled to letters as against the nominee of a non-resident heir of the intestate.

By the COURT:

L. A. Evans petitioned, as creditor, for letters of administration. M. P. Cutler petitioned for letters as Public Administrator. The petitions were heard together, and on the hearing the said Evans produced a written request from the father and heir of the estate that letters be granted to him, Evans. The father was a non-resident of this State. The Court made an order that letters issue to Evans, and from this order Cutler appealed.

This was error. See sections 1369 and 1379, C. C. P., also, Estate of Cotter, 54 Cal., 217; Estate of Kelly, 57 Cal., 81; Estate of Morgan, 53 Cal., 245; Estate of Beech, 11 Pac., C. L. J., 511.

The order is reversed, and the cause is remanded for further proceedings.

IN BANK.

[Filed November 16, 1883.]

No. 7693.

LAWRENCE *v.* NUNAN.

By the COURT:

The qeestion involved in this case is, whether, upon the sale of the property from Watkins to Bagnasco, there was an actual and continued change of possession, within the meaning and intent of the statute. The evidence upon that subject was conflicting, but there was sufficient to sustain the finding.

Judgment and order affirmed.

IN BANK.

[Filed November 26, 1883.]

No. 10,801.

THE PEOPLE RESPONDENT, *v.* KING APPELLANT.

PRIOR CONVICTION—INFORMATION—JURY. Defendant was convicted of petty larceny upon an information charging him with grand larceny and a previous conviction for felony. At his arraignment he admitted the previous conviction, and upon the verdict against him and his admission the Court sentenced him to the State Prison for five years.

Held, Where a person who has been convicted of a public offense, punishable by imprisonment in the State Prison, commits another offense after such conviction, it is necessary, since the repeal of Sections 969 and 1025, Penal Code, in proceeding against him, by indictment or information, not only to charge the facts of the previous conviction and subsequent commission of crime, but to prove them. The defendant must plead to both charges, and upon the issue raised by his plea, both must be proved on his trial, and be passed upon *by the jury*.

ID. Being convicted only of petty larceny defendant was punishable only under Section 490, Penal Code, by fine or imprisonment in the County Jail, or by both.

Appeal from Superior Court, Alameda county.

Attorney-General for respondent.
J. H. Smith and *T. F. Barry* for appellant.

McKEE, J., delivered the opinion of the Court:

The defendant was convicted of petit larceny upon an information which charged him with the commission of grand larceny, and with having suffered a previous conviction for felony. At his arraignment he admitted that the charge of a previous conviction was true; and upon the verdict rendered against him and his admission of the former conviction the Court sentenced him to imprisonment in the State Prison for a term of five years.

The sentence was imposed under Subdivision 3, Section 969, of the Penal Code. By the provisions of that section, when a defendant in a criminal case is convicted of grand or petit larceny, after having suffered a previous conviction for felony, the Court, in which the conviction is had, is authorized to punish him by imprisonment in the State Prison not exceeding five years. A conviction for petit larceny and a former conviction for grand larceny, therefore, subjects a party to be punished as for a felony. Such legislation has been held constitutional. (*Ex parte Gutierrez*, 45 Cal. 429; *Plumbly* v. *Comm.*, 2 Met. 413.) The increased

punishment is not regarded as a part of the penal consequences of the first offense, but applies exclusively to the last as aggravated by the repetition of the same offense.

But although the information against the defendant contained a charge of a previous conviction of grand larceny, there was not, at the time the information was made and filed, or when the defendant was arraigned upon it, any existing law which required the Court to ask the defendant whether he had suffered such a previous conviction, and permitted him to answer that he had or had not.

Before April 9, 1880, there was a section of the Penal Code which provided that, "in charging in an indictment, the fact of a previous conviction of a felony * * * it is sufficient to state: 'That the defendant, before the commission of the offense charged in this indictment, was in (giving the title of the Court, etc.) convicted of a felony * * .'" (Sec. 969, Pen. C., 1873–4.) There was also a section which provided as follows: "When a defendant, who is charged in the indictment with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted, he must be asked whether he has suffered such previous conviction. If he answer that he has, his answer shall be entered by the Clerk in the minutes of the Court, and shall, unless withdrawn by consent of the Court, be conclusive of the fact of having suffered such previous conviction in all subsequent proceedings. If he answer that he has not, his answer shall be entered by the Clerk in the minutes of the Court, and the question whether or not he has suffered such previous conviction shall be tried by the jury which tries the issue upon the plea of 'not guilty,' or in case of a plea of 'guilty,' by a jury impanneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads 'not guilty,' and answers that he has suffered the previous conviction, the charge of previous conviction shall not be read to the jury, nor alluded to on the trial." (Section 1025, Penal Code, 1873–4.)

The Court below proceeded against the defendant under the last section. When the defendant appeared for arraignment he was asked by the Court whether he had suffered the previous conviction charged in the information, and he answered that he had, but that he was not guilty of the subsequent offense with which he was charged. According to the section referred to, that made but a single issue to be tried by the jury, namely, the guilt or innocence of the subsequent offense.

But both sections, 969 and 1025, were absolutely repealed on April 9, 1880 (Amendments to Penal Code, pp. 15, 19), and there was no substituted legislation which authorized the proceeding which was taken against the defendant as to the charge against him of the previous conviction. The question asked him at the time of his arraignment was therefore illegal. He was not legally bound to answer it; and his answer could not be used against him, as the equivalent of a verdict of guilty, upon which, in connection with a verdict of petit larceny, he could be adjudged guilty of felony and punished.

Manifestly, the Legislature intended that a previous conviction of grand larceny, followed by a subsequent commission of the same offense, or of petit larceny, should constitute an aggravated offense, for which the offender ought to be punished as for a felony. But the charge of the previous conviction which entered into and made part of the aggravated offense was one to which the accused had the right to plead, and for which he had the right to be tried as in other cases.

It is true that Section 1158 of the Penal Code provides: "Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense for which the defendant is indicted or informed against, must also find whether or not he has suffered such previous conviction, unless the answer of the defendant admits the charge," etc. But that exception to the rule requiring the trial of an issue of fact, having been swept away by the repeal of the section of the Code which required such an answer to be made, the defendant stood for trial upon his plea of "not guilty," and he could be tried only upon the issue raised by that plea, and be convicted only by a verdict of the jury that tried him. No person accused of a public offense can be required by an unauthorized question asked him at his arraignment to criminate himself. (Sec. 688, Pen. C.) Nor can he be tried or convicted under the provisions of a law which has been repealed; nor can he convicted unless by the verdict of a jury accepted and recorded by the Court, or upon a plea of "guilty," etc. (Sec. 689, *supra.*)

Where, therefore, a person who has been convicted of a public offense, punishable by imprisonment in the State Prison, commits another offense after such conviction, it is necessary, since the repeal of Sections 966 and 1025 of the Penal Code, in proceeding against him by indictment or information, not only to charge the facts of the previous con-

viction and subsequent commission of crime, but to prove them. The defendant must plead to both charges; and, upon the issue raised by his plea, both must be proved on his trial and be passed upon by the jury. There is no other mode of proving the facts. "A more severe penalty is denounced by the statute for a second offense; and all the facts to bring the case within the statute must be established on the trial." (*The People* v. *Johnson*, 55 N. Y. 514.) And the jury must by their verdict find the charge of a previous conviction true or not true. (Section 1158, *supra*.) Until there is such a verdict there can be no judgment of conviction upon the charge; and no punishment for an offense of which there has been no conviction. Being convicted only of petit larceny, the defendant was punishable under Section 490 of the Penal Code by fine or by imprisonment in the County Jail, or by both, within the limits fixed by the law; but he was not punishable as for a felony under Subdivision 3, Section 666, *supra*. The judgment pronounced was therefore erroneous.

Judgment reversed and cause remanded, with directions to the Court below to pronounce sentence within the limits prescribed by Section 490 of the Penal Code.

We concur: Ross, J., Sharpstein, J., Thornton, J.

I concur in the judgment: McKinstry, J.

IN BANK.

[Filed November 26, 1883.]

No. 10,861.

PEOPLE, RESPONDENT, *v.* FAHEY, APPELLANT.

JURISDICTION—ASSAULT—PUNISHMENT. The Superior Court has jurisdiction of an information charging "an assault by means likely to produce great bodily injury, to-wit, with a brickbat weighing about five pounds."

ID. The extent of punishment which the Court may inflict does not affect the jurisdiction.

McKEE, J., delivered the opinion of the Court:

To an information charging the defendant with having committed the crime of "an assault by means likely to produce great bodily injury, to wit: With a brickbat weighing about five pounds," a demurrer was filed upon the grounds that the Court had no jurisdiction of the offense charged, and that the complaint did not conform to the requirements of Sections 950–51–52 of the Penal Code, and the Court sustained the demurrer on the ground that it had no jurisdiction of the offense charged.

This was error. Section 245 of the Penal Code provides that "every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the State Prison, or in a county jail, not exceeding two years, or by fine not exceeding five thousand dollars, or by both." The offense charged was therefore a felony of which the Court had jurisdiction (Section 5, Article VI, Constitution), and the fact that the offense charged included within it a lesser offense, of which the defendant might be convicted, or that the Court, in the exercise of its discretion, could inflict punishment within the limits prescribed by law upon any conviction which might be rendered in the case, in no way affected the jurisdiction of the Court to try and determine it.

Judgment reversed and cause remanded for further proceedings with direction to overrule the demurrer.

We concur: Ross, J., Myrick, J., McKinstry, J., Sharpstein, J., Thornton, J.

IN BANK.

[Filed November 28, 1883.]

No. 8042.

DANIEL AND WIFE, RESPONDENTS,

v.

HOLLAND SMITH, ADMINISTRATOR, ET AL., APPELLANTS.

GIFT CAUSA MORTIS. To constitute a *donatio causa mortis* the gift must be made in contemplation of the near approach of death by the donor, to take effect absolutely only upon the death of the donor. There must be a delivery of the property, either to the donee or to some person for his use or benefit, and the donor must part with all dominion over the property, and the title must vest in donee, subject to the right of the donor at any time during his life to revoke the gift.

ID. The evidence is held insufficient to establish a gift *causa mortis*.

Appeal from Superior Court, San Francisco.

F. J. French and J. M. Burnett for respondents.
H. Holland for appellants.

THORNTON, J., delivered the opinion of the Court:

This action was brought to recover of the Hibernia Savings and Loan Society a sum of money specified in the complaint.

A claim to this money was set up by Holland Smith, as the administrator of the estate of Abraham Fielding, deceased, and he was made a defendant that the validity of his claim as against the plaintiff might be determined. Judgment was rendered for the plaintiffs and Smith moved for a new trial which was denied, thereupon Smith appealed from the judgment and order denying a new trial.

The sole question to be determined is whether the money sued for was given to Emma Daniel, wife of her co-plaintiff, by Abraham Fielding, in view of death. This must be determined upon the evidence adduced on the trial of this cause.

The plaintiffs proved that Fielding died on the 12th day of May, 1880, in the city of San Francisco, that a short time before the 7th day of May, 1880, he became suddenly ill, and that at the time he became ill, and on the day last named, he had a general account with the defendant, the Hibernia Savings and Loan Society, evidenced by a passbook, showing a balance due him of $522.99. The passbook was put in evidence.

The plaintiffs then called David Cornfoot, who testified, that on Friday morning Fielding requested him to take charge of his effects, consisting of bank books, money and assignment of mortgages and deeds and other papers, and requested him to hold them in trust for him until he got well, and if he (Fielding) should die, he requsted him to transfer them to his daughter Emma for her use; that this was the condition he received them under on the 7th day of May, that he (witness) was to keep them in trust for him, and if he lived and got well, he was to return all his property to him, that if he (Fielding) died, he was to give it to his daughter; that he (Cornfoot) kept the bank book until his death, and the evening Fielding died he delivered it to his daughter, Emma Daniel. Fielding stated that he did not know whether he was going to live or die, and he wanted some one to look after him, to see that he would not want for anything and to pay his bills, and to take general charge of him and his affairs while he lived. That was his object in transferring his effects to me. "The instructions to me," (said Cornfoot) "in regard to the bank book were to keep possession of it while he lived, and in case he should require any of that money for his sickness to draw it on his order, and pay it out as far as his sickness required it; and if he should die before any of the money should be used out of the bank book, he was to give it, as above stated, to his daughter with instructions for her to draw the money and to

appropriate it to her own use. None of the money was used from the bank, there being sufficient without it.

It was admitted that the bank-book offered in evidence was the same book delivered to Cornfoot by Fielding on the 7th of May, 1880. It was also admitted that the defendant Savings and Loan Society was at the time set forth in the complaint, and is a corporation, and that defendant Smith was the duly appointed administrator of the deceased Abraham Fielding.

The plaintiff proved that before the commencement of this action they were married, and that Emma Daniel had demanded of the Society aforesaid, the sum sued for with the accruing dividends, and that no part thereof had been paid. The plaintiffs rested and the defendant Smith moved for a non-suit on the following grounds:

"*First*—There is no evidence to prove that the plaintiffs or either of them, were the owners of, or entitled to receive $522.99 in gold coin of the United States, deposited with the defendant, the Hibernia Savings and Loan Society, in the name of A. Fielding.

"*Second*—There is no evidence of any delivery of the gold coin or money, or bank-book, symbolical or otherwise, by the said A. Fielding to said Emma Daniel; on the contrary, the evidence shows that he retained possession, control and ownership for his own use; that the said Emma Daniel did not have or claim to have any interest, control or possession of the bank-book or money in bank, until after the death of said Fielding, nor did any one hold possession thereof for her."

The Court denied the motion and Smith excepted. The cause was then submitted and judgment rendered for plaintiffs. The defendant Smith moved for a new trial, and in his statement specified wherein the evidence was insufficient to sustain the decision of the Court, which specifications presented substantially the same points as are set forth in the grounds for a nonsuit.

It is contended that the foregoing established a gift in view of death of the money in the Savings and Loan Society mentioned above, by Fielding to Emma Daniel. Such is the question presented herein for decision.

To constitute a *donatio causa mortis*, the gift must be made in contemplation of the near approach of death by the donor, to take effect absolutely only upon the death of the donor. There must be a delivery of the property, either to the donee, or to some person for his use or benefit, and the donor must part with all dominion over the property, and

e title must vest in donee, subject to the right of the donor any time during his life to revoke the gift. (*Dole* v. *Lin-*n, 31 Maine 428–9; *Curry* v. *Powers*, 70 N. Y. 217; *Hatch* *Atkinson*, 56 Maine 327; *Taylor* v. *Henry*, 48 Md. 550.) l the authorities agree that there must be a delivery of the roperty intended to be the subject of the gift. *Ham* v. ore's *Admr.*, 8 Ohio State, 242; *Fiero* v. *Fiero*, 5 N. Y. p. Ct. (T. & C.) 151; *Case* v. *Dennison*, 9 R. I. 88; *Mc-rath* v. *Reynolds*, 116 Mass. 566.)

Is there any evidence of such delivery here, and with in-nt by Fielding to part with all dominion over the money? he only evidence is that of Cornfoot. He does not state y manual tradition of the pass-book to him. It does not pear that this pass-book was at the place where the above ted conversation occurred between Fielding and Corn-t. Nor is it stated that the book was locked in a trunk drawer, and the keys delivered to Cornfoot that he might sess himself of the book. The statement of Cornfoot en above, is that Fielding "requested me to take charge his effects, consisting of bank-books, money and assign-nt of mortgages and deeds and other papers, and re-ested me to hold them in trust for him until he got well; d if he should die he requested me to transfer them to his ughter Emma for her use. That was the condition I re-ived them under on the 7th of May. I was to keep them trust for him, and if he lived and got well, I was to re-rn all his property to him; and if he died, I was to give it his daughter Emma."

We see nothing of delivery here. It may be remarked hat it is afterwards stated that it was admitted that the ank-book offered in evidence "was the same book delivered o said Cornfoot by said Fielding on the 7th of May, 1880," ut in our judgment this language was only intended to in-dicate that the book offered in evidence was the same as the book which was afterwards taken possession of by Cornfoot, nd by him handed over to Emma Daniel; that the word "*delivered*" used in stating the admission, was not used as indicating an actual tradition of the book on the 7th of May, when the conversation took place, but to identify the book as the one which came into possession of Cornfoot under the authority given him to take charge of it and hold it in trust for Fielding, and which was afterwards handed over by Corn-foot to Emma Daniel.

To show how strict is the requirement of delivery to con-stitute a gift *causa mortis* we refer to the case of *Case* v. *Den-nison*, 9 R. I. 88. In this case, a gift *causa mortis* was claimed

of a sum of money deposited in a savings bank in Providen
The bank-book was not in the possession of the alleg
donor, a married woman, but was in the possession of anot
person in Providence. The donor aforesaid died at Mys
Conn. Shortly before her death she told her son that s
had not long to live, spoke of the bank-book being in p
session of her son-in-law, and that she wanted him (her s
to get it, settle the bills, and if anything was left to div
it among her three children. After her death her son (
of the defendants in the case cited), obtained possession
the book, but the bank refused to pay him the money
posited, without a bond.

This was held not to be a donation *causa mortis* for w
of delivery. The Court, by Durkee, J., observed as follo
as to the matter: "We think the defendant is not entitled
either the bank-book or the money which it represents a
gift *mortis causa*. There was no delivery." The Court s
further: "It is urged that the book was in possession of M
Lawton, who, it is claimed, was a donee, and that it was
where the intestate could get it to deliver, and that u
these grounds the gift should be sustained. But we thin
delivery should not be dispensed with on such ground
(See also on this point the cases above cited of *Fiero* v. F
and *McGrath* v. *Reynolds*, *supra*). It has been held that
must be delivery, even where the subject of the gift is
possession of the donee when the gift is made. (*Cutting*
Gilman, 41 N. H. 147; *Huntington* v. *Gilmore*, 14 Barb. 2
Shower v. *Pilek*, 4 Exch. 477.)

In view of the strict requirements of the law as to deliver
as shown by the foregoing, we cannot hold that a delive
was established in this case. Nor does it appear that t
dominion or control over the bank-book or the money in t
Loan Society ever passed from Fielding, or that any intere
ever vested in the alleged donee. There was no language
gift used. On the contrary, the testimony indicates, in o
judgment, the creation by Fielding of a bailment in tru
or agency which was to terminate with the death
Fielding.

In our judgment the evidence was insufficient to establi
a gift *causa mortis*, and the Court erred in refusing to gr
the motion for a nonsuit, and in its decision in favor of t
plaintiff. The judgment and order must therefore be r
versed, and the cause remanded for a new trial, and it is
ordered.

We concur: McKinstry, J., Ross, J., Sharpstein, J., M
Kee, J.

IN BANK.

[Filed November 28, 1883.]

No. 8137.

IEL AND WIFE *v.* HOLLAND SMITH, ADMR., ET AL.

the Court:

n the authority of *Daniel* v. *Smith*, No. 8042, judgment order reversed, and cause remanded for a new trial.

IN BANK.

[Filed November 21, 1883.]

No. 7577.

SON, RESPONDENT, *v.* SAMSON ET AL., APPELLANTS.

E COURT—JURISDICTION—PROBATE OF WILL. An order admitting a will to probate (it subsequently appearing that the testator was *non compos mentis* at the time of the execution of the will), if the Court had jurisdiction of the subject-matter and the parties, is not void but voidable.

T—INFANTS AND PERSONS OF UNSOUND MIND. The probate of a will may be set aside as to some heirs, who were laboring under a disability at the time of the probate, and who intended a contest within one year after the removal of their disability, and yet hold good as to those who allow this period to pass without contesting.

ppeal from Superior Court, San Francisco.

add and Heydenfeldt for respondent.
lastick, Belcher & Mastick for appellants.

oss, J., delivered the opinion of the Court:

his is an appeal from a judgment made and entered vember 26, 1880, revoking the probate of a will which been admitted to probate in the year 1870. The revoon was had upon proceedings initiated on the 26th of y, 1880, by and on behalf of a minor child of the deed, under and by virtue of that provision of the statute ch saves to infants and persons of unsound mind a period ne year after their respective disabilities are removed in which to contest the validity of a will. The deceased surviving him a widow and four minor children. Shortly er his death the widow presented to the proper Probate urt a document purporting to be the last will and testaent of the deceased, together with a petition praying its mission to probate. An order was duly made by the

Court, fixing a day for hearing the petition and proving the will, and directing notice to be given and the proper citations to be issued and served. Citations were duly issued and served upon the minor children, and the Court appointed an attorney to represent them at the hearing. At the time appointed proof was taken, and with the consent of the attorney for the minor heirs, the Court admitted the document to probate as the last will and testament of deceased, and appointed the widow executrix—she being named in the will as executrix and sole devisee, the children being by name expressly excluded from any share in the estate. Letters testamentary were afterwards issued to the widow, the estate administered, and finally, in 1875, about five years after the administration was begun, a final decree of distribution was entered by which all of the property of the estate remaining undisposed of was distributed to the widow; and the administration was then brought to a close. No further step was taken in the matter of the estate until July 26, 1880, when one of the children, then 17 years of age, filed a petition in the Court of Probate for the revocation of the will upon the ground that at the time of the execution of the instrument the deceased was *non compos mentis* and therefore incompetent to make a will. It is said for the appellant that the order made by the Probate Court in 1870 admitting the document to probate as the last will and testament of the deceased, is a conclusive determination of its validity, since all of the heirs and parties in interest were then before the Court and the Court had jurisdiction of the subject matter. It is not necessary to determine how this would be if it appeared that at that time a contest was made on behalf of the heirs, to which the provisions of the statute in relation to new trials and appeals would have applied, for it does not appear that any contest arose until the filing of the petition on behalf of Fannie Reis Samson on the 26th of July, 1880, which was within the time allowed her by Section 1333 of the statute for that purpose. Meanwhile, however, the other heirs had permitted one year after the removal of their respective disabilities to pass without instituting any contest; and the point is made that as to them, at least, the decree of probate is conclusive. This position we think, must be sustained. We see no difficulty in avoiding the probate so far as the interests of the contesting heirs are concerned, and permitting it to stand so far as concerns the heirs who have lost their rights by the lapse of time. It must be remembered that as the Probate Court had jurisdiction of the subject-matter and of the parties, its

order admitting the document to probate is not void, but voidable merely. In this connection we quote the language of the Surrogate in *Bailey* v. *Stewart*, 2 Redfield's R., p. 227: "It is quite clear to my mind that where a petition shows a case conferring jurisdiction, the Surrogate has authority to act in the premises and it is not true to say that the subsequent discovery of persons who were entitled to an interest in the estate as heirs, would render the decree void. Such a state of facts would only render the decree inoperative as to the person so discovered to be entitled. Suppose, as an illustration, that a testator should die, leaving as is supposed, but three children, and upon that assumption, the will should be probated, and many years thereafter it should turn out that a fourth child supposed to be dead, was living, can it be seriously pretended that such a discovery would render a probate void? If so, most disastrous consequences might result to the estate and to those who had become possessed of it. The most that could said in such a case would be that the probate might be avoided so far as the interests of the heir not cited is concerned, and that the probate for that purpose would be set aside, if at all, on appeal to the discretion of the Surrogate."

Cause remanded with directions to the Court below to modify the judgment in accordance with the views expressed in this opinion.

We concur: Myrick, J., Thornton, J., Morrison, C. J.

IN BANK.

[Filed November 21, 1883.]

No. 8599.

THOMPSON, RESPONDENT, *v.* SAMSON ET AL., APPELLANTS.

PROBATE COURT—JURISDICTION—PROBATE OF WILL. An order admitting a will to probate (it subsequently appearing that the testator was *non compos mentis* at the time of the execution of the will), if the Court had jurisdiction of the subject-matter and the parties, is not void but voidable.

CONTEST—INFANTS AND PERSONS OF UNSOUND MIND. The probate of a will may be set aside as to some heirs, who were laboring under a disability at the time of the probate, and who instituted a contest within one year after the removal of their disability, and yet hold good as to those who allow this period to pass without contesting.

INNOCENT PURCHASER FROM EXECUTRIX. The heir may pursue the property into the hands of a distributee, but not into the hands of an innocent purchaser from the executor or distributee.

Appeal from Superior Court, San Francisco.

Mastick, Belcher & Mastick for respondent.
Ladd and *Heydenfeldt* and *Wilson & Otis* for appellants.

Ross, J., delivered the opinion of the Court:

Antonio B. Samson died in the city and county of San Francisco on the 28th of July, 1870, leaving surviving him a widow and four minor children. Shortly after his death the widow presented to the proper Probate Court a document purporting to be the last will and testament of the deceased, together with a petition praying its admission to probate. An order was duly made by the Court fixing a day for hearing the petition and proving the will, and directing notice to be given, and the proper citations to be issued and served. Citations were duly issued and served upon the minor children, and the Court appointed an attorney to represent them at the hearing. At the time appointed proof was taken, and upon the proof taken and with the consent of the attorney for the minor heirs, the Court admitted the document to probate as the last will and testament of the deceased, and appointed the widow executrix—she being named in the will as executrix and sole devisee, the children being by name expressly excluded from any share in the estate. Letters testamentary were afterwards issued to the widow, the estate administered, and finally, in 1875, about five years after the administration was begun, a final decree of distribution was entered by which all of the property of the estate remaining undisposed of, including the real property here in controversy, was distributed to the widow; and the administration was then brought to a close. Subsequent to this the widow borrowed of Thompson, the plaintiff in the present action, sixteen thousand dollars, and to secure its repayment mortgaged the property to him. The mortgage was foreclosed, the property sold pursuant to a decree of foreclosure and sale, Thompson bought it, and in due time received from the Sheriff a deed conveying to him all of the interest of the mortgagor therein. The regularity of the probate proceedings and of the proceedings in the foreclosure suit are not questioned, but it appears that during the pendency of the foreclosure suit, that is to say in the year 1880, one of the minor children of the deceased Samson, by a guardian duly appointed, filed in the Probate Court a petition praying the revocation of the document which ten years before had been adjudged to be the last will and testament of the deceased, upon which petition, after pro-

ceedings regularly had, the Probate Court found that the deceased was *non compos mentis* at the time of making the alleged will, and therefore, on the 26th day of November, 1880, entered a decree annulling the order made in 1870 admitting the document to probate and adjudging that the same was not the last will and testament of the deceased Samson. In the case entitled *Samson* v. *Samson*, No. 7577, just decided, we have held that the decree thus rendered in 1880 must be modified so as to be limited to the protection of the rights of the contesting minor, and cannot be permitted to extend to the heirs who slept upon their rights and became barred by the lapse of the statutory time allowed them for such contest. But the question in the present case is, what is the effect of the revocation upon the rights of the purchaser from the distributee of the estate?

On the part of the heirs it is contended that, when the probate of the will was revoked and it was determined that the document purporting to be a will was in fact not a will, every step in the probate proceedings from the admission of the document to probate to and including the final distribution of the estate, became absolutely void and of no effect, and that any and all conveyances made by the distributee of the estate became likewise of no effect. The result of sustaining this proposition is, of course, to hold that no purchaser at an executor's sale, and no purchaser from any heir, legatee or devisee made even after final distribution can ever be secure in his purchase until the expiration of one year after every infant and person of unsound mind who may be interested in the estate shall have been relieved of their respective disabilities. If this is the law of course we must so declare it, however disastrous the consequences may be. But is it the law? It is true that there is a provision of the statute saving to infants and persons of unsound mind one year after their respective disabilities are removed within which to contest the probate of a will. But the statute also makes provision for the presentation to the proper Probate Court of a petition for the probate of a document purporting to be the will of a deceased person, for a hearing of the petition after due notice, the establishment of the will by proper proof, its admission to probate, and thereafter, for the proper administration of the estate and its final distribution to the person or persons entitled thereto—the statute declaring the decree of distribution to be "conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal." (Section 1665, Code of Civil Procedure.)

These various provisions of the statute must be construed together and effect given them in accordance with legal principles. The fundamental error on the part of appellant's counsel is in not keeping in mind the distinction between proceedings that are void and those that are viodable merely. If administration should be had upon the estate of a man supposed to be dead but who is in fact alive, the entire proceedings would be utterly null and void in however strict compliance they might be with the statutory requirements; and this because of the absence of the necessary subject-matter for the exercise of jurisdiction. A case of this sort was before us recently, entitled *Stephenson* v. *Superior Court*, (10 Pac. C. L. J. p. 497.) Of course, where the proceedings are absolutely void, all rights and titles dependent upon them must fall. But not so when the proceedings are only voidable. In the case at bar there is no question but that the the Probate Court throughout the proceedings culminating in the decree of distribution, had jurisdiction of the subject-matter and of the parties in interest, and that all the proceedings in the matter of the estate to and including the entry of the decree of distribution were in accordance with the provisions of the statute. That being so, it is plain that the decree of distribution was not void. At most it was only voidable. Whether the instrument propounded as a will was executed in the manner required by law and was what it purported to be, the last will and testament of the deceased, was a fact the Probate Court was called upon to determine in the exercise of the jusisdiction it had acquired over the subject-matter and over the parties in interest, and when that Court decided that it was, and proceeded to administer the estate, its acts and those of the executrix under its authority and pursuant to the statute, were valid and binding as to all dealings with third parties had in good faith and for value. (*Fitch* v. *Miller*, 20 Cal. 383; *Stephenson* v. *Superior Court*, *supra*; Fisher & Bassett, 9 Leigh (Va.) 119; *Andrews* v. *Avery*, 14 Gratt, 236; *Menell* v. *Dennison*, 17 How. Pr. 426.) Precisely the same reason that protects a purchase consummated from an executor or administrator before his administration is revoked or superseded, protects the purchaser from the distributee of the estate.

When, as in the case of Samson, the probate of a will has been annulled upon a contest initiated by an heir subsequent to an entry a decree of distribution, the heir may undoubtedly pursue the property, and perhaps its proceeds, in the hands of the distributee, but, for the reasons already given, he cannot follow the property into the hands

of one who bought in good faith and for value from the executor, administrator or distributee prior to the revocation and at a time when the proceedings appeared and were valid and binding.

Judgment affirmed.

We concur: Myrick, J., Thornton, J., Morrison, C. J.

We dissent: McKinstry, J., Sharpstein, J., McKee, J.

DEPARTMENT No. 1.

[Filed November 16, 1883.]

No. 9211.

LIVERMORE, PETITIONER, *v.* BRUNDAGE, RESPONDENT.

MANDAMUS—DISQUALIFICATION OF JUDGE. A Judge, who is himself a party to an action pending in his Court, has no jurisdiction to hear and determine an application for a change of venue. It is his duty to order the case to be transferred for trial to the nearest Court of an adjoining county, unless it shall be stipulated to transfer it to some other Court; and mandamus will lie to compel the transfer.

MCKEE, J., delivered the opinion of the Court:

The petitioner is plaintiff in an action against the defendant, who is Judge of the Court in which the action is pending. Being defendant in the action and Judge of the Court in which the action is pending, it was not necessary for the petitioner, in making a motion to transfer the cause, to serve the Judge of the Court with notice of the motion, as it would be in a motion for a change of venue under the provisions of Section 396 C. C. P., in a suit before him between ordinary litigants; for in an action pending in his Court, to which he himself is a party, he has no jurisdiction to hear and determine an application for a change of venue.

Being a party to the action the Judge was directly interested in the action and disqualified from acting at all, except so far as the action might be affected by the arrangement of the calender of his Court, or the regulation of the order of business, and except to transfer the case to some other Court for trial. A Judge who is a party to a cause pending in his Court should not assume to sit in the case (Sub. 1, Sec. 179, C. C. P.); nor has he any authority to retain the case in his Court by non-action. The law imposes upon him a single duty in regard to it, and that is to order the case to be transferred for trial to the nearest Court of an adjoining county, unless it shall be stipulated to transfer it to some other Court.

Section 398 C. C. P. provides as follows: "If an action or proceeding is commenced or pending in a Court, and the Judge or Justice thereof is disqualified from acting as such * * * *it must be* transferred for trial to a Court the parties may agree upon by stipulation in writing, or made in open Court, and entered in the minutes; or if they do not so agree, then to the nearest Court where the like objection or cause for making the order does not exist." Other than the duty imposed by this provision of the Code, a Judge who is a party to an action or proceeding pending in his Court has no discretion in the case.

Let a writ of mandate issue.

We concur: Ross, J., McKinstry, J.

IN BANK.

[Filed November 28, 1883.]

No. 10,828–9.

PEOPLE, RESPONDENT *v.* MURBACH, APPELLANT.

HOMICIDE—INSTRUCTION—MINUTES—MISTAKE—CLERK—JUDGMENT—JURY—PUNISHMENT. An instruction objected to held not erroneous. There was no assumption of the guilt of defendant in the language employed by the Court.

ID. No words of reproach, however grievous, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter.

ID. On entering judgment on the minutes the Clerk made it appear that the Court, in pronouncing it, had informed defendant "of the indictment found against him * * * November, 26, 1883," instead of 1882. *Held*, the Court below, upon notice, had power to correct the entry as to date, so as to express the truth, and the appeal by defendant from the judgment did not affect such exercise of power.

ID. *Further*, the error as to date in the entry referred to would be so evidently a mere clerical mistake, which in no way prejudiced defendant in any substantial right, that the judgment would not be reversed even if the error had not been corrected.

ID. The statement made by the Court to defendant of the nature of the charge made against him and of which he had been convicted, although necessary as preliminary to pronouncing judgment, was no part of the Judgment.

Appeal from Superior Court, Napa County.

Attorney-General for respondent.
H. C. Gesford for appellant.

MCKEE, J., delivered the opinion of the Court:

Appeal from a judgment of death pronounced against the defendant upon a conviction for murder in the first degree,

and also from an order made subsequent to the judgment. The assignments of error are, that the Court exceeded its jurisdiction in making the order appealed from, and that it misdirected the jury by the following instructions, namely:

"1. You can find defendant guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of manslaughter, or you may render a verdict of not guilty; and it is for you to decide which one of these verdicts you may render, but if you do find the defendant guilty of murder in the first degree you have the discretion to determine the nature of his punishment; and if in your sound judgment and discretion there is any fact or circumstance in the case which ought to mitigate the extreme penalty of death, you will by your verdict indicate the same; but if you find no such mitigation in the facts of the case, and think the death penalty should be inflicted, you will simply find him guilty of murder in the first degree."

"2. No words of reproach, however grievous, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter."

Objection is made to the first instruction that the Court in saying to the jury, "but if you do find the defendant guilty of murder in the first degree," etc., virtually announced that the defendant was guilty of that crime; and that, by the other parts of the instruction, the jury were improperly restricted in the exercise of their power of discretion to determine the punishment to be inflicted upon the defendant.

There was no assumption of the guilt of the defendant in the language employed by the Court. The jury were properly directed that they could, upon the indictment, find the defendant guilty of any offense included within the crime for which he was indicted; but if they should find him guilty of the highest offense, namely, murder in the first degree, it would be their duty to decide whether he shall suffer death or confinement in the State Prison for life, and that was to be determined at their discretion. With this power of discretion a Court cannot interfere. The jury should be left entirely free to act according to their judgment. If they see fit to exercise the power at all, they have the exclusive right to determine, within the limits prescribed by the law which gives them the power, the punishment for which the defendant ought to be sentenced. And we find nothing in the challenged instruction which limited or restrained them in the exercise of that power.

The second instruction was applicable to the case, and was a correct explanation of the law of the subject to which it related. (*The People* v. *Turley*, 50 Cal. 470; *The People* v. *Butler*, 8 *id.* 435; Wharton's Criminal Law, 368.)

The question upon the appeal from the order made after judgment arises out of the following facts:

The indictment charged that the murder was committed on the 26th day of November, 1882. Of that crime the defendant was convicted, and upon the conviction, judgment of death was regularly pronounced.

But the Clerk, on making up his minutes of the proceeding in Court when the defendant appeared for sentence, entered, as part of the proceeding, that the Court informed the defendant "of the indictment found against him for the crime of murder committed on November 26, 1883." This entry did not express the fact; and, after discovering the mistake which had been made, the Court, upon notice to defendant and his counsel, ordered the entry to be corrected by changing the figures "1883" to "1882," so as to express the truth. The order to that effect was made March 12, 1883. Meantime the appeal had been taken from the judgment; and it is contended that the Court had no jurisdiction, pending the appeal in this Court, to make the order.

But the true statement, which was made by the Court to the defendant, of the nature of the charge made against him and of which he had been convicted, although necessary as prelimiminary to pronouncing judgment (Section 1200, Penal Code), was no part of the judgment pronounced; and a mistake made by the Clerk in the entry of the statement on the minutes of the Court would not invalidate the judgment. The mistake was, therefore, one which could be corrected at any time, while the record of the case was subject to the physical control of the Court, so as to make the record speak the truth. The power of the Court in that regard was not suspended by the appeal. (*Roussel* v. *Boyle*, 45 Cal. 64; *Sheldon* v. *Gunn*, 57 *id.* 40; *Boyd* v. *Burrel*, 60 *id.* 284.)

Besides, as the defendant was sentenced for the crime for which he had been indicted and convicted, by a judgment regularly pronounced, the error as to date in the entry referred to could be so evidently a mere clerical mistake, which in no way prejudiced the defendant in any substantial right, that the judgment itself would not be reversed, even if the error had not been corrected. (Section 1404, P. C.; *People* v. *Sprague*, 53 Cal. 491; *People* v. *Gilbert*, 6 Pac. C.

L. J. 968: *People* v. *Brotherton*, 47 Cal. 338; *People* v. *Colby*, 54 *id.* 37.)

Judgment and order affirmed.

We concur: Ross, J., Sharpstein, J., Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed November 16, 1883.]

No. 8705.

FORBES, PETITIONER,

v.

THE COUNTY OF EL DORADO, AND THOMAS HARDIE, A. A. BAYLEY, AND SETH LOVELESS, CONSTITUTING THE BOARD OF SUPERVISORS OF SAID COUNTY, AND THOMAS HARDIE, CHAIRMAN OF THE BOARD OF SUPERVISORS OF SAID COUNTY, E. W. WITMER, AUDITOR, AND GEORGE BURNHAM, TREASURER OF THE COUNTY OF EL DORADO, CONSTITUTING EX-OFFICIO THE BOARD OF RAILROAD COMMISSIONERS OF SAID COUNTY, RESPONDENTS.

PLEADING—VERIFIED ANSWER—EXECUTION OF ASSIGNMENT. The genuineness and due execution of the assignment of railroad bonds issued under the Act of March 28, 1863, can be denied without a verified answer. Section 447 C. C. P. does not relate to assignments, but to instruments which may be assigned.

MANDAMUS—INSUFFICIENCY OF ALLEGATIONS. Where the fact alleged is one, the existence or non-existence of which must be known to a party, a denial for want of information or belief is not good; but whether the plaintiff, who seeks to compel the defendants to perform a duty respecting certain Railroad Bonds under the Act of March 28, 1863, is the owner thereof or whether they had been duly assigned to plaintiff, are facts the existence or non-existence of which could not be known to the defendants, and a denial for want of information was sufficient.

McKINSTRY, J., delivered the opinion of the Court:

This is an original proceeding in the Supreme Court, and the plaintiff has moved for judgment upon the complaint and answer.

The petition avers that the petitioner is the "owner and holder" of certain railroad bonds "issued under the Act of March 28, 1863, with the coupons attached, assigned to him by an indorsement printed and written on the back of said bonds, signed by the President and Secretary of the Railroad Company." To this the answer is: "To the allegation (reciting it) said respondent answering, says that it (the

Board of Supervisors) has no information or belief on the subject sufficient to enable it to answer said allegation, and therefore on that ground denies that the said bonds or any of them were assigned to said petitioner, or that he was, at the commencement of this action, the owner or holder of them or any of them."

It is contended by petitioner that the genuineness and due execution of the assignment can be denied only by verified answer (C. C. P., 447). To this there are two replies: First, a copy of the assignment is not set forth in the complaint, nor are copies of the bonds; second, Section 447 of the Code of Civil Procedure does not relate to assignments, but to instruments which may be assigned. Whatever the effect of the payment of interest to plaintiff, as *evidence*, the allegations in the petition of such payments, undenied, did not relieve the plaintiff of the necessity of averring that he was the owner and holder of the bonds. It is further urged by counsel for petitioner that there is no denial because the answer does not in express terms deny that an indorsement to him, printed and written on the bonds, was signed by the President and Secretary of the Railroad Company. But the answer avers that the respondent has no information or belief as to such indorsement or signatures, or that plaintiff is the owner or holder of any of the bonds, and denies, *therefore*, that any of the said bonds were assigned to the petitioner, or that he is the owner or holder of any of them.

The last clause of Section six of the Act of 1863 provides that the bonds delivered to the railroad company may be transferred "by said company" by written or printed transfer upon the back thereof, signed by the President and Secretary, etc. Unless the word "assigned" is the equivalent of "transferred" the petitioner does not allege that the bonds were transferred to him by written and printed transfer. But, assuming the words to mean the same thing, the complaint would have been sufficient if it had alleged that the bonds were assigned by the railroad company. The legal implication would be that they were assigned in the only way they could be assigned under the statute. The pleadable fact is the assignment and the assignment is denied. Moreover, the statute only limits the mode of assignment by the railroad company. After they were indorsed by the company they could pass from hand to hand by simple delivery, in accordance with a custom recognized by many adjudications relative to such instruments. Hence the plaintiff added that he was the owner and holder when the suit was commenced. The allegation that the bonds were as-

signed to him by the railroad company would not have been sufficient. It would show that he was once the owner, but the rule that a *status* or condition which existed in the past is *presumed* to continue is a rule of evidence, not of pleading. It would not appear but that he had sold and delivered the bonds to a third person. The petitioner very properly added, therefore, that when he applied for the writ of mandate he continued to be the owner and holder of the bonds under the assignment. This last averment is distinctly denied by the answer.

It has been held that where the fact alleged is one whose existence or non-existence must be known to a party a denial for want of information or belief is not good. But we cannot assume that the defendant must have known that plaintiff was the owner and holder of any bonds when the present proceedings were instituted.

It is not necessary to examine the pleadings further. If plaintiff was not the legal owner of the bonds when the writ was applied for he is not entitled to the mandate.

The plaintiff's motion for judgment on the pleadings is denied.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed November 30, 1883.]

No. 9161.

REYNOLDS *v.* THE SUPERIOR COURT.

Certiorari.

By the COURT:

By means of *certiorari* the petioner seeks to call in question the validity of a judgment and an order made and entered considerably more than one year before the presentation of his petition. In *Keys* v. *Marin County* (42 Cal. 256), it was held that unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of *certiorari* should be held to be barred by the lapse of the same length of time that bars an appeal from a final judgment.

In the present case no excuse is shown for the delay in the application.

Writ denied and proceedings dismissed.

DEPARTMENT No. 1.

[Filed November 16, 1883.]

No. 8704.

McDONALD

v.

THE COUNTY OF EL DORADO ET AL.

By the COURT:

Upon the authority of *Forbes* v. *The County of El Dorado et al.*, plaintiff's motion for judgment on the pleadings is denied.

IN BANK.

[Filed November 28, 1883.]

No. 8404.

BIDDEL, APPELLANT,

v.

BRIZZOLARA ET AL., RESPONDENTS.

MORTGAGE—SUBROGATION—STATUTE OF LIMITATIONS—ACTION—CONTRACT—DEBT—ACKNOWLEDGMENT—PROMISE—PURCHASER—DEFICIENCY. To establish a new contract after the Statute of Limitations has run, there must be a promise to pay, or an acknowledgment from which a promise is necessarily implied.

ID. It is very certain that an actual promise can only be made to the creditor, and it follows that the acknowledgment from which the promise is to be inferred must be made to the creditor. An admission to a stranger of the existence of the debt cannot be construed an acknowledgment to the creditor such as indicates an intention on the part of the person making the admission to hold himself bound to pay, nor is it expressive of his willingness to pay.

ID. Treating the complaint as a bill for the foreclosure of the mortgage, the action was barred by the Code limitation of time within which such an action may be commenced.

ID. The purchaser from the mortgagor assuming the mortgage as part of the consideration of his purchase, and prior to action brought on the mortgage debt reconveying to the mortgagor, is not liable to the mortgagee when the latter's cause of action on the mortgage debt is barred by the Statute of Limitations.

ID. If the liability of the subsequent purchaser to his grantor to indemnify him against the mortgaged debt be extinguished, as between themselves, by a reconveyance before bill for foreclosure filed, the contract of indemnity being thereby put an end to by the act of those who were parties to it, the mortgagee will not be entitled to a decree for a deficiency against such a purchaser, founded on such a stipulation in his deed.

ID. The mortgagee can only be entitled to be subrogated to an *existing* remedy of his debtor, the mortgagor, upon a legal *existing* stipulation. But the contract between Brizzolara and Roberts was at an end when the complaint herein was filed.

ID. The liability of the mortgagor is contingent upon the fact that a sale of the mortgaged premises shall fail to satisfy the debt and costs. It is against this contingency that the purchaser indemnifies him.

ID. Plaintiff cannot take a decree for the sale of the lands in this action against demurrer or the Statute of Limitation. He cannot take a personal judgment for a deficiency, because the amount of the deficiency, if any, can be ascertained only after decree for the sale of the premises, a sale thereof and the Sheriff's return of said sale.

ID. An independent action at law cannot be maintained for a debt, whatever its form, secured by mortgage.

Appeal from San Louis Obispo County.

McD. R. Venable and *John Scott* for appellant.

Wm. J. & Wm. Graves and *J. M. Wilcoxon* for respondents.

MCKINSTRY, J., delivered the opinion of the Court:

The Court below sustained the defendant's demurrer to the complaint. The defendant by his demurrer, among others, took the objection that the cause of action alleged in the complaint was barred by the Statute of Limitations, and the objection that the complaint did not contain a statement of a cause of action.

The complaint contains the allegation: "So late as the 28th day of June, 1880, * * * the defendant, Bartolo Brizzolara, by an instrument in writing signed by him, acknowledged said mortgage indebtedness and that the same was a lien on said mortgaged property."

To establish a new contract, made after the statute has run, there must be a promise to pay, or an acknowledgment from which a promise is necessarily implied. (*Biddel* v. *Brizzolara*, 56 Cal. 374.) It is very certain that an actual promise can only be made to the creditor, and it follows that the acknowledgment from which the promise is to be inferred, must be made to the creditor. An admission to a stranger of the existence of the debt cannot be construed an acknowledgment to the creditor such as indicates an intention on the part of the person making the admission to hold himself bound to pay, nor is it expressive of his willingness to pay. "An unqualified acknowledgment to a stranger will not take a case out of the statute or constitute a good cause of action." (*Trousdale's Admr.* v. *Anderson*, 9 Ky. 276; see also *Kyle* v. *Wells*, 17 Pa. St. 286; *Taylor* v. *Hendrie*, 8 Nev. 243.)

Treating the complaint as a bill for the foreclosure of the mortgage the action was barred by the Code limitation of time within which such an action may be commenced.

In the contract of sale of the mortgaged premises from Bartolo Brizzolara to Roberts, the consideration of the sale is thus stated: "That the consideration of said sale is as follows: Eleven thousand dollars in gold coin, to be paid as follows: The party of the second part assumes a mortgage on said property held by Philip Biddel, principal and interest amounting to $6,090, and assumes to pay the county and State taxes on said property for the current year, amounting to $136, and this day pays to the party of the first part the sum of one thousand dollars in cash, the receipt whereof is hereby acknowledged by the party of the first part, and the balance of such purchase money, $3,774 50, is secured to be paid by a promissory note of this date, payable on the 5th day of November, 1878."

The complaint alleges that Roberts, prior to the commencement of this action, reconveyed the mortgaged property to Bartolo Brizzolara, the mortgagor.

It is urged by appellant that although the Statute of Limitations may have run against the mortgage debt, the plaintiff is entitled to a decree for the sale of the mortgaged premises, and to a personal judgment, for any balance of the mortgage debt unsatisfied by application of the proceeds of the sale, against Bartolo Brizzolara, *as successor in interest of Roberts;* and that, as the promise of Roberts was made within four years before the commencement of this action, the plea of the statute is not well taken against the action as an action on such promise.

There is no averment in the complaint that Bartolo, by reason of any language in the reconveyance from Roberts, or otherwise, ever promised the latter to pay the mortgage.

It was held in New York the liability to the mortgagee of the grantee of the mortgagor, who assumes and agrees to pay the mortgage, arises out of the broad doctrine that when one makes a promise to the benefit of a third person, the latter may maintain an action upon it. (*Burr* v. *Beers*, 24 N. Y., 178.) But the case last cited was an action at law, and Denio, J., says there was abundant authority to the point that the right to a personal judgment for a deficiency against the grantee of the mortgagor was not based in the previous chancery decisions in New York upon the notion of a direct contract between the grantee of the equity of redemption and the holder of the mortgage, but upon the principle that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. He proceeds to say that the common

law judgment in the case then before the Court obviously could not be sustained by reference to the doctrine of the Courts of equity. He adds, if the judgment could be sustained at all it must be upon the broad principle that if one person make a promise to another, for the benefit of a third person, the third person may maintain an action on the promise. He admits upon that question there has been a good deal of conflict of judicial opinion, and that the cases supposed to create a direct obligation from the purchaser of the equity of redemption to the mortgagee—"are doubtless subject to some of the criticisms which have since been applied to them. Some of the opinions were pure *obiter dicta*, and in others the case, though presenting the point, was decided on other grounds." * * * "Finally the question came squarely before this Court in *Lawrence* v. *Fox* (20 N. Y. 268), and we there held, with *hesitation* on the part of a portion of the Judges who concurred, while others dissented, that the action would lie. We must therefore regard the point as definitely settled, so far as the Courts of this State are concerned." In view of the very able and exhaustive examination of the cases by Mr. Justice Comstock, in his dissenting opinion in *Lawrence* v. *Fox*, we can give but little persuasive effect to the judgments in that case and in *Burr* v. *Beers*.

The doctrine of *Burr* v. *Beers*—which has not been generally approved—can have no place in courts of *equity*, where the right of the mortgagee to take a decree against the grantee personally, for a balance unsatisfied by the sale of the premises mortgaged, has been placed upon different ground. The case at bar is not an action at law; the framework of the complaint is that of an equitable pleading, and the prayer is for a sale of the premises, and for a personal judgment for deficiency against the defendants Bartolo Brizzollara and Austin Roberts, etc. Indeed under our Code an independent action at law can not be maintained for a debt whatever its form, secured by mortgage. (C. C. P., 726.)

It has distinctly been decided by the Supreme Judicial Court of Massachusetts that no action *at law* by the mortgagee lies on a promise made to the vendor, by the purchaser of an equity of redemption, to assume a mortgage on the premises, and to pay the mortgage note. (*Muller* v. *Whipple*, 1 Gray, 317; *id.* p. 324.)

The Court in that case say that certain expressions used by Lord Holt, in *Yard* v. *Eland*, (1 Ld. Raym., 368), and by Buller, J., in *Marchington* v. *Vernon*, (1 Bos. and Pul., 101,

note), to the effect—"On a promise, not under seal, made by A, for a good consideration to B, to pay B's debt to C, C may sue A"—had been transferred into various text books, as if it were a general rule of law. But Mr. Justice Metcalf remarked, that the maxim required great modification; because it expresses rather an exception to a general rule, than the rule itself; and adds that, by recent decisions of the English Courts, the operation of the rule or maxim is restricted within their narrower limits, and the general rule to which it is an exception, is now more strictly enforced. "That general rule is, and always has been, that a plaintiff in an action on a simple contract, must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract. The rule is sometimes thus expressed: There must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action, by the plaintiff, on the contract." (Citing cases.)

The learned Judge then proceeded to classify the exceptions to the general rule, and the Court are quite certain that the promise to the mortgagor by the purchaser of the equity of redemption, to pay off a mortgage, does not constitute an exception.

The classification of the Massachusetts Court may not be exhaustive, but if there be other exceptions they must be such as stand upon a like footing of reason and justice with those enumerated. For convenience the classes of exceptions may be summarized: First. Those in which the action for money had and received may be maintained, where a debtor has put money or property as a fund into the hands of one who has promised to pay the debt of him from whom he has received the fund. (But, see *Weston* v. *Barcer*, 12 John. 282.) Second. Where promises have been made to a father or uncle for the benefit of a child or nephew.

The Supreme Court of Massachusetts were very confident that the case, *Muller* v. *Whipple*, did not come within any recognized exception. The defendant there—the purchaser of the equity of redemption—had no money which in equity and good conscience belonged to the plaintiff, the mortgagee; no funds of the mortgagor, property, money or credit, had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on the mortgagor. The sale of the equity of redemption did not lessen the plaintiff's security for the mortgage debt. (A different reason is given by the Massachusetts Court, but it is equally true in the case

at bar, that the sale of the mortgaged premises did not lessen the plaintiff's security. Except the limitation was pleaded, he retained a right to a decree for the sale of the mortgaged premises, and to judgment over for any deficiency.) There was (and is here) no nearness of kin between the parties. It was held in *Muller* v. *Whipple*, that the mortgagee could not maintain an action at law against the purchaser, because there was nothing in the nature of the transaction to take it out of the general rule in the opinion recited.

The doctrine of courts of equity with reference to the liability of the grantee of the mortgagor is very clearly set forth in the cases cited by Mr. Jones in his work on mortgages—(Secs. 740, 779)and especially in *Crowell* v. *Hospital* (27 N. J. Eq., 650).

In the case last referred to it was said a stipulation in a deed of conveyance *inter partes* that the grantee shall assume and pay a prior mortgage on the premises, is a contract with the grantor simply for his indemnity, and will not be regarded in law or equity as a contract with the mortgagee or for his benefit. And in *Halsey* v. *Reed* (9 paige, 445), where the purchaser assumed the bond and mortgage and there was a recital in the conveyance "the amount thereof (of the mortgage debt) constitues a part of the consideration of this conveyance and has been deducted therefrom," Chancellor Kent held that this agreement was not intended as an absolute and unconditional promise to pay the principal and interest to the mortgagor but an agreement to indemnify the mortgagor against the payment of the mortgage debt.

In *Crowell* v. *Hospital* it was adjudged, that the right of the mortgagee to a personal decree for a deficiency against a subsequent purchaser, whose deed contains such a stipulation, does not result from any fixed of vested right in the mortgagee, arising either from the acceptance of the conveyance of the mortgaged premises by the grantee, or from his obligation to pay the mortgage debt as between himself and his grantor, but it rests merely on the doctrine of Courts of Equity, that a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the position of surety holds for his indemnity, and in such case the mortgagee may proceed directly against the purchaser, who is ultimately liable, to avoid circuity of action.

In the same case it was held, that if the liability of the subsequent purchaser to his grantor to indemnify him against

the mortgaged debt be extinguished, as between themselves, by a reconveyance before bill for foreclosure filed, the contract of indemnity being thereby put an end to by the act of those who were parties to it, the mortgagee will not be entitled to a decree for a deficiency against such a purchaser, founded on such a stipulation in his deed.

Roberts, the purchaser in the case at bar, is not a party to this appeal. As we have seen, the attempt here is to obtain a decree for the sale of the mortgaged premises, although the statute of limitations has barred an action on the mortgage debt, and a personal judgment against the mortgagor; not only *as* mortgagor, but in his capacity of grantee from Roberts, although the deed from Roberts accepted by Bartolo, the mortgagor, contains no language which can be construed a re-assumption of the mortgage debt by the latter, or a promise on his part to indemnify Roberts.

It is certain that if plaintiff was not entitled to a personal judgment for deficiency against Roberts he is not entitled to such judgment against Bartolo Brizzolara. If the complaint had been filed for a foreclosure before the running of the statute, plaintiff would have been entitled to a personal judgment for deficiency against Bartolo as mortgagor, but to no such judgment against Roberts if the reconveyance had been made before the filing of the complaint, and to none such against Bartolo in his distinct character as grantee of Roberts.

The general rule of chancery is that as to strangers to the contract the parties may at their pleasure abandon it and mutually release each other from its performance. (2 Spence's Eq. Juris., 280.) And the case at bar does not come within any established exception to the general rule. The case cannot be brought within the class in which *trusts* have been enforced by beneficiaries who were not previously agreed to the creation of the trust.

The mortgagee being the representative and standing in the place of the mortgagor, to enforce the rights of the latter against the purchaser, *and having no greater or other equity in himself*, is entitled only to such remedy as the mortgagor himself had when the bill was filed. "In other words, being a stranger to the contract of the purchaser with the mortgagor and to the consideration whereon it was founded, it will be competent for those who where parties to it to rescind and extinguish it at their pleasure; and after such rescission and extinguishment, the contract becomes utterly incapable of enforcement." (*Crowell* v. *Hospital, supra.*) The mortgage can only be entitled to be subrogated to an *existing* remedy

of his debtor, the mortgagor, upon a legal *existing* stipulation. But the contract between Bartolo Brizzolara and Roberts was at an end when the complaint herein was filed.

Even where the rule has been established that the purchaser is bound by his promise as a promise made for the benefit of the mortgagee, it is still necessary that the grantor should be personally liable upon the mortgage in order to render the grantee liable upon his covenant to the holder of the mortgage assumed. In *King* v. *Whitely*, (10 Paige, 465) the grantor of an equity of redemption in mortgaged premises, neither legally nor equitably interested in the payment of the bond and mortgage, except so far as the same were a charge upon his lands, conveyed the lands subject to the mortgage, and the conveyance recited that the grantees therein assumed the mortgage, and were to pay off the same as part of the consideration. It was held that as the grantor in that conveyance was not personally liable to the holder of the mortgage, the grantees were not liable to the holder of the mortgage to pay the same. So late as the year 1877, *King* v. *Whitely* was approved and its principal affirmed. (*Vrooman* v. *Turner*, 69 N. Y. 380.) In the case last cited the previous New York cases, including *Burr* v. *Beers*, are carefully considered and distinguished.

Under the section of the Code of Civil Procedure (726), "there can be but one action" for the recovery of any debt secured by mortgage, in which the Court must by its judgment direct the sale of the incumbered property, and the application of the proceeds to the debt and costs; and if it appear by the Sheriff's return that the proceeds are insufficient, judgment can be docketed against the mortgagor, etc. Thus, whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it, until decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency, which shall appear on the Sheriff's return. The liability of the mortgagor is, therefore, contingent on the fact that a sale of the mortgaged premises shall fail to satisfy the debt and costs. It is against this contingency that the purchaser indemnifies him. True, the statute authorizes a single decree which provides for a sale of the mortgaged premises and a subsequent judgment over against the mortgagor to which, upon the equitable principle of subrogation, may be added a judgment over against the purchaser (where the latter has indemified his vendor) for any deficiency which way appear from the Sheriff's return.

But the return of the Sheriff, which makes absolute the personal liability that was before conditional, and liquidates and renders certain the damages for which the mortgagor is personally liable, must always follow and depend upon a decree for and a sale of the premises.

In the case before us the mortgagor did not pay his debt, and he never became liable to a personal judgment for deficiency, because no decree for a sale of the premises was ever entered. Had the title to the premises remained in Roberts, Bartolo Brizzolara, the mortgagor, would have had no cause of action against him, nor would the plaintiff, who could have claimed only to be subrogated to Bartolo's claim against Roberts, such as it was.

Plaintiff cannot take a decree for the sale of the lands in this action, against demurrer or plea of the statute of limitations. He cannot take a personal judgment for a deficiency, because the amount of the deficiency, if any, can be ascertained only after decree for the sale of the premises, a sale thereof, and the Sheriff's return of said sale.

Judgment affirmed.

We concur: Sharpstein, J., Myrick, J., Thornton, J., Ross, J.

CONCURRING OPINION.

I concur. Where a purchaser of real estate from a mortgagor assumes payment of the mortgage debt, as a part of the consideration of his contract of purchase, there arises out of the transaction, upon the principal of subrogation, a cause of action for the benefit of the mortgagee, which he may enforce, at any time within the life of his mortgage, by an action at law or in equity against the purchaser. But if as in the case in hand, the mortgagee sleeps upon his remedial rights against the mortgagor and purchaser, until the time of the Statute of Limitations has run against the mortgage debt, and the lien of the mortgage has become extinguished, and the purchaser and mortgagor have rescinded their contract, there is no remedial right which can be enforced at law or in equity by the mortgagee against the mortgagor or the purchaser. (*Simpson* v. *Brown*, 68 N. Y. 355; *Durham* v. *Bischoff*, 47 Ind. 211; *Kelly* v. *Roberts*, 40 N. Y. 432.)

McKEE, J.

DEPARTMENT No. 1.

[Filed November 16, 1883.]

No. 8775.

SCOTT, APPELLANT,

v.

THE SIERRA LUMBER COMPANY, RESPONDENT.

TRUST—EXECUTION OF. Action to recover possession of certain real and personal property, and damages for detention. The owners, C. & W., being largely indebted, conveyed the property by deed in trust, and empowered the trustees to sell the property, in case of certain default, for "gold coin" or cash, and after payment of certain sums the balance to be paid C. & W. or their assigns. The Court below found that the property was sold under the trust to plaintiff for the trustees, and with the undersdtanding that no money was to be paid. *Held*, that the sale was invalid.

PRACTICE—PLEADING—EQUITY. The allegations of the complaint and answer put in issue the due execution of the special power of sale in the trust deed, and the validity of the sale, and this issue having been made and tried, plaintiff can not now claim that the action is one simply of "ejectment" and "claim and delivery," and deny to the defendant the benefit of the findings upon that issue.

Appeal from Superior Court, Sacramento County.

G. Cadwalader for appellant.

E. B. Mastick and *C. A. Garter* for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The power contained in the deed of trust, recited in the complaint and findings, empowered the trustees, in case of certain default, to sell at public auction for "gold coin," or cash. The Court below found that the trustees offered the real and personal property (except the two lots in Red Bluff,) for sale, "and struck off the same to plaintiff, who at their request and *for them* bid the sum of fifty thousand dollars, upon the distinct understanding that he was not *to pay any money*, or take or have any interest in the property, otherwise than in trust for them." It would seem to be unnecessary to argue that a power to sell at auction for cash did not authorize the trustees to sell to themselves upon an indefinite credit, or to convey the legal title to a third person, without consideration. It is suggested, however, that the creditors only could complain of the manner of the sale. But the instrument of trust provides that, after payment of the creditors and certain expenses, the balance or surplus of the proceeds of the sale for cash "shall be paid to the parties of the first part, their heirs or assigns." Thus Campbell & Welton

and their assigns were interested in the due execution of the power of sale, not only as grantors of the legal estate and donors of the special power, but also as contingent beneficiaries. Nether Campbell nor Welton, nor any of their assigns, agreed to surrender their interest in the estate, or its proceeds, and to receive therefor a claim against the trustees, as such, or in their individual capacities; if indeed the transaction with respect to the sale can be held to have been intended to create such liability.

It is said the deed from the trustees conveyed the legal title, on which plaintiff can recover the possession *at law*, and we are asked to treat the present as an action at law, combining the actions known among us as "ejectment" and "claim and delivery" of personal property.

The Court below found that the trustees never received possession of any of the real or personal property described in the complaint, but that Campbell & Welton delivered possession of all the property to the Sierra Flume and Lumber Company, to whom the same was sold for a valuable consideration—$275,000. An allegation of the complaint is: "Campbell & Welton sold all the property (excepting lots 13 and 14 in block No. 13 in the town of Red Bluff) to the Sierra Flume and Lumber Company * * for the price of $275,000, out of which said Sierra Flume and Lumber Company retained the amount of said promissory note," etc. This is a very clear admission and statement that the Sierra Flume and Lumber Company were purchasers for value. There is no finding that the Sierra Flume and Lumber Company or the trustees in bankruptcy, or defendant had actual notice of the transfer of the personal property to the trustees. The record of the deed of trust operated no constructive notice of the transfer of *personal* property.

It may be conceded, for the purposes of this case, that the general power of the trustees to sell and convey was coextensive with their legal ownership, and that such power was entirely distinct from the special power to sell contained in the deed and, as a consequence, that the deed to plaintiff passed the naked legal title to the lands therein described.

There can be no doubt, however, that if plaintiff had commenced an action of ejectment, the defendant could have filed a cross complaint praying that the sale and conveyance to plaintiff be set aside.

But the present suit cannot be upheld as an action at law for the recovery of the possession of the real property. Even if the averment of probative facts as to the transfer of the legal title to the real estate could be held to be sufficient in

the action here known as "ejectment," plaintiff has not contented himself with alleging a transfer by deed of the legal title to the trustees, and from the trustees to himself, but has averred an exact execution of the special power of sale set forth in the deed of trust. Defendant has responded in its answer, that the purchase was made in the name of plaintiff, but to and for the use of Kraft—one of the trustees—and the Court found that the purchase was without any consideration, and for the use and benefit of all the trustees. The finding, although somewhat broader in terms, is no broader in its legal effect than the allegation of the answer. Thus by reason of the allegation of plaintiff and the answer thereto of defendant, an issue as to the due execution of the special power of sale (an issue which, as claimed by appellant, could not have been tried in an action at law), was presented to the Court; an issue proper to be determined in a Court of equity. This equitable issue having been made and tried, defendant ought not to be deprived of the benefit of a finding in its favor—as to the execution of the special power of sale and the validity of the conveyance based upon the sale—merely because of its omission to *pray* that the sale be set aside and the conveyance annulled. But, not only do the averment as to the due execution of the special power and the counter-statement of defendant present an issue of fact to be tried appropriately only in a Court of equity, but the whole tenor of the complaint indicates a purpose to resort to the Court as a Court of equity. The complaint concludes with the general prayer, "for such other and further relief as the equity of the case may warrant;" instead of the brief and comprehensive averments held to be sufficient in the action at law, the complaint contains a long recital of probative facts, many of which would have no place in the evidence, treating the action as simply one at law, and including statements of special equities upon which was based an application for the appointment of a receiver. A receiver was in fact appointed by the Court below. But a receiver cannot be legally appointed in an action of ejectment, (*Bateman* v. *Superior Court*, 54 Cal., 285).

Plaintiff selected his *forum*, and having appealed to a Court of equity, was not entitled to have that Court try an ejectment, even if his bill should have been dismissed on the ground that he had a complete remedy at law. But he asked for appropriate decree in equity, and if he had got all implied by his allegations and prayer the sale under the special power would have been validated. Even if we would

be justified in any case in culling separated allegations from a complaint, purporting to be an application to the equity side of the Superior Court, and, disregarding all other portions of the pleadings, in uniting such separated allegations and creating out of them a sufficient complaint *at law*, we would not be justified in doing so for the purpose of maintaining a technical right to the possession on the part of the holder of the naked legal title, acquired under a sale found (upon an issue actually made by the pleadings) to have been a violation of the trust.

The sale and conveyance through which the plaintiff claims to have acquired the title, should have been set aside.

The order denying the new trial is affirmed, and the cause is remanded, with direction to the court below to modify its decree so as to provide therein that the sale made by Grant, Sanderson, Kraft and Cadwalader, trustees, and the deed by them executed and delivered to plaintiff be set aside and annulled.

We concur: Ross, J. McKee, J.,

Abstract of a Recent Decision.

DIVORCE—SUIT FOR ABATES ON DEATH—WIFE'S RIGHT TO SUPPORT. (1.) A divorce suit being a personal action, the death of either party before decree abates the divorce proceedings; and this effect extends to whatever is identified with those proceedings. Where pending a suit by the wife for a divorce *a mensa et thoro*, the husband dies before a final decree, the Court cannot, after the death of the husband, require his executor to become a party to the suit, to answer the demand of the wife for an additional allowance for counsel fees for services rendered in the cause during the lifetime of the husband, nor pass an order requiring such executor to pay the same. (2.) A wife has the right, independently of the actual merits of the case, to require her husband, when she is living apart from him, and without means of her own, to defray the expenses of prosecuting her suit for a divorce, the Court exercising its sound discretion as to when and to what extent such allowance shall be granted. Authorities referred to: *Wilson* v. *Ford*, L. R., 3 Ex. 68; *Shafer* v. *Shafer*, 30 Mich. 164; *Dow* v. *Eyster*, 79 Ill. 254; *Pearson* v. *Darrington*, 32 Ala. 254. *McCurly* v. *McCurly*. Opinion by Ritchie, J. (Md. Ct. of Appeals.)

Pacific Coast Law Journal.

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NOTICE.

We are peparing an index which will conclude the present volume. Many subscribers have paid us for the entire volume—to February—we will bind their numbers and return them to balance the accounts, or remit the overpaid portion, or turn it over to the *West Coast Reporter*, which should be taken by all our subscribers. We confidently expect that those who have not paid will do so at once. *We are doing unto our creditors as we desire our debtors do unto us.*

Current Topics.

IN MEMORIAM.

We are dead, that is, we will be dead after we have written this last "Current Topic." It is rather an unusual feeling, this dying sensation. If we were a human being we might obtain some consolation from our belief in a hereafter. The conundrum once propounded by a learned divine, viz.: "After death, what?" would then have, at least, the credit of making us pause and think. But not being human we know that there is for us no life beyond the grave. No more will the "devil" worry us, the compositor growl at us, and the subscriber fail to pay us. We do not die by our own hands. We do not appreciate our own untimely demise. We had really just begun to enjoy life. We had a few more ideas to give to our readers, that must now be born in vain. We worked for a laudable end. We tried to be useful. We hope we will be missed.

As we are modest in our taste, we have prepared this inscription for our tomb:

"The Pacific Coast Law Journal,"
Born February 23d, 1878.
Died December 29th, 1883.
Aetat 5 years and 10 months.

Supreme Court of California.

IN BANK.

[Filed November 23, 1883.]

No. 7592.

GULZONI, RESPONDENT, v. TYLER ET AL., APPELLANTS.

NEGLIGENCE—BOAT—OWNER—EVIDENCE—HANDWRITING—RELEASE. In this case it is held the trial Court erred in sustaining objections to the introduction of evidence by defendants to prove that at the time when plaintiff received the injuries complained of, defendants were not managing, controlling or running the steamer on which plaintiff was injured, but that the same was run, managed and controlled by the California Steam Navigation Company. Such evidence was relevant to a material issue in the case.

ID. If the owner of property lets or lends it and transfers the entire possession and control of it to another, the owner is not responsible for the wrongful use or mismanagement of it by the transferee. Whoever had the exclusive possession, management and control of the boat, its officers and men, was alone responsible for its mismanagement. And whether rightfully or wrongfully in such possession the liability would rest on them alone. Under the rule *respondeat superior* this must be so.

ID. The evidence of what plaintiff said when asked whether he blamed anybody on the boat, shou'd not have been stricken out. Evidence of what he said in regard to the occurrence was admissible for the defense. If he expressed an opinion as to who was to blame, defendants were entitled to have the benefit of it.

ID. It was error to permit plaintiff to write his name in the presence of the jury for the avowed purpose of having the jury compare, and then permitting them to compare his signature, written in their presence, with his signature to a release signed by him about the time of his receiving his injuries, in order "to show the nervous condition of the witness at the time of the accident."

ID. Under an instruction to the effect that if a man of ordinary prudence would have considered it dangerous to be near the gangway of the boat it was not contributory negligence for the plaintiff to be there, unless warned of the danger by the employees of the boat; and even then it was not contributory negligence for him to remain there unless a man of ordinary prudence would have considered it dangerous to do so, an ordinary jury could hardly be expected to see very clearly what would constitute contributory negligence.

Appeal from Superior Court, San Francisco.

Geo. Pearce and *M. A. Edmonds*, for Respondent.
E. S. Pillsbury, for Appellants.

SHARPSTEIN, J., delivered the opinion of the Court:

The Court erred in sustaining objections to the introduction of evidence by the defendants to prove that at the time when the plaintiff received the injuries compiained of, the

defendants were not managing, controlling or running the steamer on which the plaintiff was injured, but that the same was run, managed and controlled by the "California Steam Navigation Company." Such evidence was relevant to a material issue in the case. The plaintiff alleged that said steamer was employed by the defendants in carrying passengers, etc., and that said "defendants so negligently and unskillfully conducted themselves in the *management* of the said boat and through the negligence and unskillfulness of *themselves* and *their* servants, the plaintiff was injured." This and all other allegations of the complaint were denied by the defendants in their answer, and any evidence having a tendency to prove that they did not employ said steamer in carrying passengers, nor at the time when the plaintiff received his injuries, have the management or control of it, but that the same was employed at that time in carrying passengers, and was managed and controlled by another person or corporation, was clearly admissible.

The ground upon which respondent's counsel claims that these rulings were correct, is that the boat was registered as belonging to the defendants, and although not conclusive, it was *prima facie* evidence that they were and continued to be her owners, until it was shown that they had ceased to be, and that the defendants made no attempt to prove a change of ownership; and that nothing short of this could relieve them of liability for damages caused by the negligence of those who run, managed and controlled the boat.

The rule as stated in Shearman and Redfield on Negligence (Section 501), is that if the owner of property lets or lends it, and transfers the entire possession and control of it to another, the owner is not responsibe for the wrongful use or mismanagement of it by the transferee. Whoever had the exclusive possession, management and control of the boat, its officers and men, was alone responsible for its mismangement. And whether rightfully or wrongfully in such possession, the liability would rest on them alone. Under the rule *respondeat superior* this must be so.

If the defendants were owners of the boat, but had not the possession, control or management of it themselves, or by their agents, servants or employés they cannot be held responsible for the negligence or mismanagement of whoever had the exclusive possession, control and management of it.

The evidence of what the plaintiff said when asked whether he blamed anybody on the boat, should not have been stricken out. Evidence of what he said in regard to the

occurrence was admissible for the defense. If he expressed an opinion as to who was to blame, the defendants were entitled to have the benefit of it.

It was error to permit the plaintiff to write his name in the presence of the jury for the avowed purpose of having the jury compare, and then permitting them to compare his signature, written in their presence, with his signature to a release signed by him about the time of his receiving his injuries, in order "to show the nervous condition of the witness at the time of the accident."

We know of no rule which would sanction a comparison of handwritings for such a purpose. Besides, if there was a material difference between the handwriting of the plaintiff at the different dates, there was at least a liability that some of the jurors might have been led to doubt the genuineness of the signature to the release, which was not denied.

In one of the instructions the Court substantially charged the jury that the plaintiff had a right to be near the gangway, and it was not contributory negligence for him to be there, "unless such location would have been considered by a man of ordinary prudence dangerous under the circumstances, and unless the employés of the boat had given plaintiff sufficient warning to enable him to avoid it."

And if he had "sufficient warning to enable him to avoid" the danger, was it prudent for him to remain there? Would a prudent man have remained after having been warned of the danger, even if it was not otherwise apparent to him. The instruction is to the effect that if a man of ordinary prudence would have considered it dangerous to be there, it was not contributory negligence for the plaintiff to be there, unless warned of the danger by the employees of the boat; and even then it was not contributory negligence for him to remain there unless a man of ordinary prudence would have considered it dangerous to do so. Under such an instruction an ordinary jury could hardly be expected to see very clearly what would constitute contributory negligence.

Judgment and order reversed and cause remanded for a new trial.

We concur: Ross, J., Myrick, J., McKinstry, J.

CONCURRING OPINION.

I concur in the foregoing opinion except as to the second point ruled in it. I do not think that the evidence of what the plaintiff said many hours after the happening of the event by which he was injured, was admissible in evidence. The remark of plaintiff was not an admission of a fact. It was

an inference or opinion drawn from a number of facts, and so far as we are informed by the statement or bill of exceptions, from which we get all our information on the subject, it was not based on plaintiff's knowledge of all the facts touching the manner in which he was hurt, but upon the statements of others, which might not have been true. It does not appear that plaintiff knew or could have known all the facts of the occurrence alluded to. It was most improbable that he did know them. In my opinion, the remark of the plaintiff that he was to blame, not being an admission of a fact, should not have been allowed to go to the jury.

THORNTON, J.

IN BANK.

[Filed November 28, 1883.]

No. 7515.

MURRAY, APPELLANT, *v.* GREEN ET AL., RESPONDENTS.

DEED—REPUGNANCY—CONDITION—EJECTMENT—JUDGMENT—APPEAL. The rule that a condition in a deed, restraining alienation, and repugnant to the interest created, is void (C. C. 711), applies to the deed in question.

ID. It is difficult to conceive of a condition more clearly repugnant to the interest created by a grant of an estate in fee simple than the condition that the grantee shall not alien the same without the consent of the grantor.

ID. In case of a grant in fee simple, where there is no possibility of reverter, any restraint whatever on the power of alienation would be repugnant to the interest created by the grant.

ID. A judgment in ejectment is conclusive of but two points—the right of the possession in the plaintiff at the commencement of the suit, and the occupation of the premises by the defendant at the same date.

ID. An appeal suspends the operation of a judgment for all purposes, and such judgment is not admissible in evidence in any controversy between the parties.

Appeal from Superior Court, San Francisco County.

E. A. Lawrence and *M. I. Sullivan* for appellant.
B. S. Brooks for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

When this case was here on a former appeal the Court said:

"The nature and effect of the instrument executed by and between Mary Ann Roussel and her husband and McLeran, has not been discussed by counsel, but they treat it as a deed of conveyance, and no objection is suggested as to the validity of any of the clauses of the instrument. One of those clauses prohibits McLeran from selling, conveying or otherwise disposing of any of the lands without the written consent of Mary Ann Roussel. The deed of McLeran to Murray, made during the pendency of the action of *McLeran* v. *McNamara et al.*, having been made without the written consent of Mary Ann Roussel, is absolutely void as a conveyance of any interest acquired by McLeran under the first mentioned deed, if the above clause is valid.

"The *habendum* clause recites that the premises are held, the undivided half for McLeran and the other half in trust for said Mary Ann, and another clause provides that if McLeran shall obtain the seizin or possession of any of the lands such seizen and possession shall *ipso facto* operate to invest the said Mary Ann with the legal seizin, possession and estate of and in the undivided half thereof, at her election. It is unnecessary at this time to define the precise effect of each of those clauses, but it is sufficient to say that, if valid, they vested in said Mary Ann or her assigns, the legal title to the undivided half of the land in controversy, it being the land which McLeran recovered of Murray in the above mentioned action.

"Pending that action, Mary Ann Roussel and her husband and McLeran executed a deed purporting to convey this land to Moon, and he conveyed the same to Porter, the defendant's lessor, who held the same at the commencement of this action. From these facts it results that Porter holds the entire title to the tract of land in controversy, or the undivided half thereof—that is to say, the entire title if the deed of McLeran to Murray is void because of the first-mentioned clauses of the deed, or the title to the undivided half, if he can rely only on the last two mentioned clauses of the deed. The findings, therefore, to the effect that the plaintiff Murray is the owner in fee of premises, is contrary to the evidence." (4 Pac. C. L. J. 215.)

The foregoing will be better understood, if it be stated that the deed of McLeran to Murray, antedates that of McLeran and the Roussels to Moon, who conveyed to Porter, the lessor of the defendant. So that the case turns upon the construction of the deed of the Roussels to McLeran. If that vested in him any title to the premises or to any part thereof, his deed to plaintiff doubtless conveyed

such title to the latter. But it was determined on the former appeal that the deed of McLeran did not convey any title to more than an undivided one-half of said premises to the plaintiff; leaving it an open question whether it conveyed any title whatever. By the terms of the deed of the Roussels to McLeran, they granted, bargained and sold to said McLeran, his heirs and assigns, all the lands, tenements and hereditaments of Mary Roussel situated in San Francisco, to have and to hold the undivided moiety thereof, to the proper use and behoof of him the said McLeran, his heirs and assigns, subject, however, to the provisions thereinafter inserted, as to the power and control of said McLeran over the said moiety so conveyed to his own use; and to hold the other undivided moiety in trust for the sole and separate use of the said Mary Ann Roussel and her heirs, "in manner following, that is to say: In conjunction with the said parties of the first part, or the said Mary Ann Roussel, and not otherwise, to demand, sue for, enter, take and hold seizin and possession of the same; * * * provided, however, that the said Thomas G. McLeran shall not have any power or authority to sell, convey, or in anywise to dispose of, charge or incumber any part or portion of said portion of said property, land, tenements, or hereditaments hereinbefore mentioned and conveyed to him, whether the same be that moiety conveyed to him for his own use or that moiety conveyed to him in trust for the use and benefit of the said Mary Ann; nor shall he have any authority to make or deliver any lease, leases or releases, nor any acquittance nor adjustments of or concerning said land, tenements or hereditaments, without obtaining the proper signature and written consent of the said Mary Ann, to each and every instrument or writing whereby any of said matters and things may be done; and provided, further, that whenever the said McLeran shall hereafter obtain seizin or possession of any of said property hereinbefore mentioned, such seizin and possession of him, the said McLeran, shall, *ipso facto*, operate to invest the said Mary Ann with the legal seizin and possession of the one undivided half thereof, and to invest her with the legal estate in the one undivided one-half thereof, at her election; and, if for her better security in that behalf, the said Mary Ann shall hereafter make demand of the said McLeran in that behalf, then the said McLeran shall convey to her in fee, the one undivided moiety of all or any part of said land, tenements or hereditaments whereof he may have become actually seized or possessed as aforesaid."

This is followed by a covenant of the Roussells that while said McLeran is faithfully carrying out said trusts they will not nor will either of them without his consent convey or affect the title held by them or either of them to any of said lands, and that any conveyance made by them contrary to this clause shall be null and void. And finally McLeran covenants that he will faithfully perform said trusts at his own proper costs and charges. But for the provision in regard to alienation, the grant of an undivided moiety of the premises to LcLeran would be full, absolute and explicit. And if the provision in regard to alienation, be a condition restraining alienation, and repugnant to the interest created is void (C. C. 711.)

This is simply declaratory of the common law (Coke upon Littleton, 223 *a*), and is not controverted. It is also conceded by counsel for respondent that the clause of the deed is one restraining alienation, but is not, he insists, *repugnant to the interest created*, and therefore not void. Independently of the condition, the interest created by this deed is the largest possible estate which a man can have in land, and one of the incidents *inseparately annexed* to an estate in fee simple, is the right of alienation, which "passes by the grant as perfectly as if it were given by the express grant. Without such right the estate granted would be neither a fee simple nor any other estate known to the law." (*De Peyster* v. *Michael*, 6 N. Y. 466.) "A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in anything expressed nor anything implied which is of its nature incident and is separable from the thing granted." (Hobart, 170.) The reason why such a condition cannot be made good by agreement or consent of parties, is that a fee simple estate and a restraint upon its alienation cannot in their nature coexist." (*De Peyster* v. *Michael*, *supra*.)

It is difficult to conceive of a condition more clearly repugnant to the interest created by a grant of an estate in fee simple than the condition that the grantee shall not alien the same without the consent of the grantor. With such a condition, if valid, annexed to the grant, it "would be neither a fee simple nor any other estate known to the law."

The owner of the reversion or possibility of reverter may restrain the alienation by his grantee in fee. This appears in Brooke's Abridgment, Title, "Condition," 57*a*. "If a man have lands for a term of years on condition that he shall not grant over his estate, this is good by reason of the reversion remaining in the lessor. The contrary of a feoff-

ment on such condition, or that the feoffee shall not waste, for no right or interest remains in the feoffer." In a grant to a corporation, on the dissolution of which there would be a reverter to the grantor, a condition against alienation would be valid, but in the absence of a possibility of reverter, the imposition of such restraint is not sanctioned by any case so far as we are advised.

But it is claimed that while a general restraint upon alienation is bad, a partial restraint is valid. But is it not obvious that in case of a grant in fee simple, where there is no possibility of reverter, any restraint whatever on the power of alienation would be repugnant to the interest created by the grant. In commenting upon the clause in which Littleton says: "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issue of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., there such condition is good." Chancellor Kent says: "But this falls within the general principle, and it may be very questionable whether such a condition would be good at this day. (4 Kent's Com. 131.)

In Doe *d, Gill* v. *Pearson*, (6 East. 173), it was held that a condition only to alien to a particular person or persons is good. But this has been distinctly overruled in *Attwater* v. *Attwater*, 18 Beavan, 330. In the note to *Bradley* v. *Peixoto* (Tudor's Real Property, 862), it is said: "A condition not to alien within a limited time, it seems good," and cites *Churchill* v. *Marks*, 1 Coll. 455, and Large's Case, 2 Leon, 82. An examination of *Churchill* v. *Marks* satisfies us that it does not support that proposition; and it has been demonstrated that Large's was a case of contingent remainder, in which this question was not involved. (*Mandlebaum* v. *McDonell*, 29 Mich. 78.)

In the case before us the restriction is not limited as to time or persons. In these respects it is general, and, in our opinion, void.

Respondent's counsel relies very much on *Sprague* v. *Edwards* (48 Cal. 239), in which it was held that when a conveyance is made to a trustee, who has no interest in the trust fund, with power to sell and convey the trust land, subject to the approval of the *cestui que trust*, the deed of a trustee to a purchaser will not pass the the legal title without the approval of the *cestui que trust*.

It is impossible to discover the slightest analogy between that case and this. The doctrine there announced might apply to the conveyance of the undivided moiety in trust

from Mrs. Roussel, which, as before shown, is wholly eliminated from this case.

The title which the plaintiff aquired from McLeran after the commencement of the action of *McLeran* v. *McNamara et al.*, in which plaintiff was a defendant, was not in issue in that action, and therefore was not affected by the judgment therein. Having acquired that title after his answer in that action was filed, Murray might do as he has done, wait until he was ousted and then bring an action, founded upon a title acquired subsequently to the commencement of that action, to recover possession. "Under the Code a judgment in ejectment is conclusive of but two points: the right of the possession in the plaintiff at the commencement of the suit, and the occupation of the premises by the defendant at the same date." (Freeman on Judgments, 301; *Yount* v. *Hammell*, 14 Cal. 465.)

While the appeal from the judgment in *Porter* v. *Woodward et al.*, was pending, the operation of that judgment for all purposes was suspended, and it was not admissible in evidence in any controversy between the parties. (Freeman on Judgments, 328; *Woodbury* v. *Bowman*, 13 Cal. 634.)

The conclusion at which we have arrived is that by the deed of McLeran to Murray, he acquired the fee of an undivided moiety of the demanded premises, and that the Court erred in finding otherwise.

Judgment and order reversed.

We concur: Morrison, C. J., Thornton, J., McKee, J., McKinstry, J.

IN BANK.

[Filed November 28, 1883.]

No. 9179.

MORE v. SUPERIOR COURT.

PROHIBITION — JURISDICTION — TRUSTEES — RECEIVER — ACTION — VENUE — EQUITY. The writ of prohibition is not the appropriate one to procure the annulment of proceedings already had.

ID. ID. The provision of the Constitution declaring that all actions for the recovery of the possession of real estate, shall be commenced in the county in which the real estate or some part thereof affected by such action or actions is situated, does not apply to an action brought by *cestius que trust* to procure the removal of trustees, the appointment of others in their stead, and the appointment of a receiver to take, hold and protect the property pending the action. Such an action is and always has been one of exclusively equitable jurisdiction, of which, by Section 5, Article VI of the Constitution, the Superior Courts are given original jurisdiction.

ROSS, J., delivered the opinion of the Court:

The writ of prohibition only goes to arrest the proceedings of a tribunal, corporation, board or person when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. Unless therefore it can be held that the Superior Court of the city and county of San Francisco has no jurisdiction of the action entitled *Welch* v. *Huse*, it is plain that the writ cannot go; for this writ is not the appropriate one to procure the annulment of proceedings already had.

It is contended that the Superior Court of the city and county of San Francisco has not jurisdiction of the action of *Welch* v. *Huse* because of that provision of the present Constitution declaring that all actions for the recovery of the possession of real estate shall be commenced in the county in which the real estate or some part thereof affected by such action or actions is situated. But in no sense is the action entitled *Welch* v. *Huse* one "for the recovery of the possession of real estate." It is an action brought by certain *cestuis que trust* to procure the removal of the trustees, the appointment of other trustees in their stead, and the appointment of a Receiver to take, hold and protect the property pending the action. Such an action is and always has been one of exclusively equitable jurisdiction, of which by section 5 of Article VI of the Constitution, the Superior Courts are given original jurisdiction.

Writ denied and proceedings dismissed.

We concur: Morrison, C. J., Sharpstein, J., Myrick, J., McKinstry, J., Thornton, J.

IN BANK.

[Filed December 26, 1883.]

No. 8046.

SMITH, RESPONDENT, *v.* TAYLOR, APPELLANT.

ATTACHMENT—RELEASE. An attaching creditor may voluntarily release property attached, and such release is valid without the sanction of the Court. (Opinion by Department 1, XI Pac. C. L. J., 325, overruled.

Craig & Meredith for Respondent.

C. H. Parker for Appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

The finding that "the plaintiff did not, at any time, release or cause to be released from attachment property of

the defendant Robinson," is not justified by the evidence, which shows "that real property sufficient in value of the defendant Robinson had been duly attached to satisfy any judgment which might be obtained in said action against said Robinson and Taylor;" and that the Sheriff was directed by the attorneys of the plaintiff to release said property of said defendant Robinson from said attachment.

The claim of respondent's counsel that real property attached as this was can only be released by order of the Court is not in our opinion tenable. The Code provides for a discharge of a writ of attachment, by order of the Court on motion of the defendant, on the ground that the same was improperly or irregularly issued. But there is nothing to indicate an intention to preclude an attaching creditor from voluntarily releasing property attached, or that such a release would not be valid until it received the sanction of the Court. And we know of no way in which the plaintiff could have made a release more effectual than by directing the Sheriff to release the property described from the attachment. The cases which hold that the Sheriff could not do this without the order of the Court, or the consent or direction of the plaintiff, have no application to this case.

Judgment and order reversed.

We concur: McKinstry, J., Thornton, J., Morrison, C. J., Myrick, J., McKee, J.

IN BANK.

[Filed December 24, 1883.]

No. 10,047.

THE PEOPLE, RESPONDENT,

v.

SHEM AH FOOK AND WANG AH TIE, APPELLANTS.

CRIMINAL PROCEDURE—SIGNING INFORMATION—CHALLENGE OF JURORS—CONDUCT OF DEFENDANT—LEADING QUESTIONS—VOLUNTARY STATEMENTS—OBJECTIONS TO ARGUMENT—READING FROM CASES.

By the COURT:

1. We cannot say the Court below abused its discretion in refusing to allow defendants to withdraw the plea of *not guilty*, and to interpose a demurrer and motion to set aside the information.

2. Nor did the Court err in denying defendants' motion to dismiss the information. On motion of defendant an in-

formation may be set aside if it be not signed by the District Attorney, or if, before the filing thereof, the defendant was not legally committed by a magistrate. (Penal Code, 995.) In the case at bar, the information was subscribed by the District Attorney of the county, and the transcript does not show but that the defendants were legally committed by a magistrate.

3. The Court properly disallowed defendants' challenge to the panel of jurors. There was no material departure from the forms prescribed for drawing and return of juries. (Penal Code, 1059.)

4, 5, 6, 7. We think the testimony of the witness *Witt* as to the manner and conduct of defendant Ah Fook, and the witness' statement that another person spoke of the peculiarity of defendant's manner at the time, was admissible. Nor was the testimony of the constable, *Meade*, as to defendants' manner aud conduct when he arrested them inadmissible—taken in connection with the declarations of Shem Ah Fook.

8, 9, 10. The eighth, ninth and tenth points of appellants are based on objections to questions of the prosecution, on the ground that they were leading questions. It was for the Court below, in its wise discretion, to permit questions leading in form.

11, 12. There was no material error in denying defendants' motion to strike out the testimony of the witness *Millard* nor in overruling the objection to *Hubner* testifying. As to the statements said by the witness to have been made by defendants, in the *evening, in the Sheriff's office*, and in the interval between the first and second day's proceedings before committing magistrate, however liable to abuse such mode of securing evidence may be, we cannot say the statements of defendants, as alleged, were not voluntarily made. There is nothing in the transcript to indicate that the statements made by defendants to each other in their cells in the jail, were not voluntary.

13. The objection to the testimony of the witness *Hubner* as to admissions of Ah Tie in conversation with Ah Fing, was properly overruled. Such admissions were proper evidence against defendant, Ah Tie.

14, 15, 16. The "exceptions," or objections to statements of counsel for the People in argument, and in the presence of the jury, cannot be considered. No action of the Court with reference to such statements was demanded or requested, nor was there any exception to the ruling or action of the Court.

17. The Court gave the instructions which were given as a charge to the jury.

18. The Court did not err in instructing as to counsel reading from cases where convictions have been had upon circumstantial evidence. (*People* v. *Cronin*, 34 Cal. 191.)

Judgment and order affirmed.

IN BANK.

[Filed December 26, 1883.]

No. 7604.

BARSTOW, APPELLANT.

v.

SAVAGE MINING COMPANY ET AL., KUTZ, INTERVENOR, RESPONDENT.

CERTIFICATE OF STOCK NOT NEGOTIABLE—SALE OF STOLEN CERTIFICATES PASSES NO TITLE. Certificates of stock are not securities for money in any sense and are not negotiable; and if shares of stock of a corporation standing in the name of A on the books of the corporation, owned by B, the certificate being properly indorsed, and if the certificate be stolen without the fault of B, the purchaser from the thief takes no title and B may pursue the property.

Appeal from Superior Court, San Francisco.

C. Bartlett and *C. L. Smith* for appellant.

G. W. Gordon, J. A. Waymire, Lloyd, Newlands & Wood for respondent.

MYRICK, J., delivered the opinion of the Court:

The facts of this case, as presented in the findings, are substantially as follows:

Prior to February 5, 1879, the defendant, the Savage Mining Company, duly issued its three certificates of stock, No. 24,843, certifying that C. A. Schmitt, trustee, is entitled to thirty shares of the capital stock of the said company, transferable on the books of the company by indorsement on and surrender of the certificate No. 25,537 in the name of Randolph, Mackintosh & Company, trustees, for ten shares, and No. 25,704 in the name of Greenbaum, Helbing & Company, trustees, for ten shares, in like tenor as the first. On the 5th of February, 1879, the plaintiff purchased from the owners thereof, for value paid, the said fifty shares, and received the said certificates properly indorsed. Thereafter, on or about May 1, 1879, the said certificates were, without any fault or negligence of the plaintiff, stolen from him, and

were on the 6th of May, 1879, sold and delivered by the thief to the defendant Rogers, he, Rogers, purchasing the same in the usual course of business, for value, without notice of any defect in his vendor's title. The plaintiff never sold the certificates or the stock which they represent, or authorized or acquiesced in, or ratified such sale. On the 30th of May, 1879, plaintiff demanded of the defendant Rogers the return of the certificates, and Rogers refused to deliver them. The intervenor, Kutz, purchased the certificate for thirty shares (subsequently to the theft) in the ordinary course of business, for value, without notice of any defect in his vendor's title, and whatever title he (Kutz) has, he derived from Rogers. None of said fifty shares have been transferred on the books of the Company from the names of the parties set forth in said certificates, except the ten shares represented by certificate No. 25,537, which have been sold for assessments. After the theft the plaintiff duly demanded of the Company a transfer of said fifty shares from the names in which they stand as aforesaid, to his own name, and the issuance to him of a certificate therefor, and such transfer and issuance were refused. On the 11th of August, 1879, the intervenor presented certificate No. 24,-843 to the Company, offered to pay any assessment levied on the stock represented thereby, and demanded a transfer to himself of the thirty shares and the issuance to him of a new certificate, which transfer and issuance were refused on the ground that the Company had already been notified by plaintiff of his ownership of the stock and of the theft, and been directed to stop transfer thereof, and had been, in connection with Rogers, sued by plaintiff concerning the ownership of the stock. The Court then found as to the value of the stock at different times involved in the transactions. From these facts the Court below concluded as law that the intervenor, Kutz, was entitled to judgment against the plaintiff and the Company for his costs, and against the Company for $460 damages, and that the defendant, Rogers, was entitled to judgment against the plaintiff for his costs, and rendered judgment accordingly. From this judgment the plaintiff appealed.

It will be seen from the foregoing, that the question for consideration is, if shares of stock of a corporation standing in the name of A on the books of a corporation be owned by B, the certificate being properly indorsed, and if the certificate be stolen without the fault or negligence of B, does the purchaser from the thief take title so as to prevent B from claiming the property?

1. It is well known to be the general rule that a thief acquires no title to the stolen property, and that he can pass none. "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title." (*Covill* v. *Hill*, 4 Denio, 323.) To the general rule above stated there are exceptions as to money and negotiable securities.

2. A negotiable instrument is defined to be "a written promise or request for the payment of a certain sum of money to order or bearer." (Section 3,087, Civil Code.) There are six classes of negotiable instruments, namely: 1, bills of exchange; 2, promissory notes; 3, bank notes; 4, checks; 5, bonds; 6, certificates of deposit. (Section 3,095, Civil Code.)

A certificate of stock, namely, that A is the owner of shares of stock in an incorporated company, is not a promise or request for the payment of money, nor does it contain any of the elements of such promise or request. "A negotiable instrument *must not contain* any other contract than such as is specified in this article." (Section 3,093, Civil Code.)

"The distinction between all these [notes, bills, corporation bonds] and corporate stocks is marked and striking. Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation." (*Mechanics' Bank* v. *N. Y. and N. H. R. R. Co.*, 13 N. Y., 627; *Sherwood* v. *Meadow Valley Mining Co.*, 50 Cal., 412.)

The case last above cited, *Sherwood* v. *Meadow Valley Mining Company*, was an action based on the following facts: One Schmeidell was the owner of twenty shares of the stock of the defendant and held a certificate therefor, issued to himself as trustee, and he sold the shares and delivered the certificate, properly endorsed, to Levy, who lost the same, not having had the stock transferred on the books of the corporation. The plaintiff purchased (as he supposed) the stock, and received delivery of the certificate, for value, in the usual course of his business as a stock broker. It was held that the plaintiff acquired no right to the stock.

In the subsequent case of *Winter* v. *Belmont Mining Company*, 53 Cal. 428, the facts were that Winter was the owner of certain shares of stock, and had them transferred on the books of the company to the name of "M, trustee," who indorsed the certificates in blank, and delivered them to Win-

ter. Subsequently M. stole the certificates from Winter, and sold them in the market in the ordinary course of business. The Court, in commenting on the statute providing that shares of stock may be transferred by indorsement and delivery of the certificate, but that the trnsfer is not valid except as between the parties until entered on the books of the corporation, and on certain prior cases holding that until such entry the stock may be sold on execution against the person in whose name the stock stood, applied that principle to the case before it of stolen certificates, and held that the purchaser from M, the thief, took a good title. We are not prepared to follow that case, (*Winter* v. *Belmont Mining Company*), in what is said in the opinion regarding the negotiability of certificates of stock; but, on the contrary, are of opinion that the principle that the thief of the stolen property (it not being money or negotiable securities) can pass no title, should be maintained, unless the facts presented by a case should bring it within the law as stated in *McNeil* v. *The Tenth National Bank*, 46 N. Y. 325: "When the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto without knowledge of the claims of the true owner." Upon referring to the transcript in *Winter* v. *Belmont Mining Company* we observe the findings of the Court state that Winter delivered his certificates to M. with permission that the latter have the shares of stock transferred on the books and certificates issued to him (M.), *for the purpose of enabling the said M. to vote at the then coming election as the owner of said stock.* Here was an element upon which, perhaps, it might properly be held that Winter was estopped from saying, as to an innocent purchaser, the title did not pass; because, for one purpose at least, viz: to vote, he had authorized M. to appear to be and act as the owner.

But if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner he must show that such negligence was the proximate cause of the deceit.

In the case at bar, the owner, Barstow, did not clothe the thief with any apparent power to pass title. The certificates (though properly indorsed) remained in the names of the former owners, and when Rogers purchased he was not dealing with any one who had apparent authority from the owner to make a disposition of the stock; he dealt with one having nothing beyond bare possession, which, as said above, does not clothe the possessor with the power of selling.

In conclusion, then, we are of opinion, and decide, that where stock of an incorporation stands on the books in the name of A, and the stock is owned by B, and the certificate (though properly indorsed) is stolen from B without his fault, the thief can pass no title and B may pursue his property.

The judgment is reversed and the cause is remanded with instructions to render judgment in favor of plaintiff, but it is not manifest that the plaintiff can have judgment against Rogers for the value of the stock, and also that the incorporation issue new certificates to him; he may have one or the other, as he elects, but not both. It is stated in the findings that the shares represented by certificate No. 25,537 have been sold for assessments. Plaintiff being the owner of those shares, he should have paid the assessments, and neither Rogers nor the incorporation should be held responsible for his omission to do so.

We concur: Sharpstein, J., McKinstry, J., Thornton, J., Morrison, C. J.

I concur in the judgment: Ross, J.

IN BANK.

[Filed December 24, 1883.]

No. 8,949.

HOME LOAN ASSOCIATION

v.

WILKINS ET AL. (KING, PETITIONER.)

By the COURT:

On the former hearing in Department Two, (XI, Pac. L. J. 252), it was held that where an appeal is taken from a judgment for the sale of mortgaged premises, by one not in possession thereof, the sale might be stayed without filing an undertaking for the payment of a deficiency arising upon such sale; and that the petitioner, not being in possession of the mortgaged premises, was entitled to have such sale stayed without filing such undertaking. It now transpires that the petitioner was in possession of such premises, and as he has not filed an undertaking for the payment of the deficiency if any shall arise on said sale, it is not stayed by the appeal. It follows that the order made in Department must be vacated, and the application for a stay be denied.

Application denied.

IN BANK.

[Filed November 2, 1883.]

No. 9338.

HEINLEN, PETITIONER,

v.

SULLIVAN ET ALS., JUDGES, ETC.

POLICE COMMISSIONERS—SUPERIOR JUDGES. Conceding that the terms of office of the Police Commissioners of the city and county of San Francisco have expired, the power of appointment does not devolve upon the Judges of the Superior Court for such city and county.

Mandamus.

G. A. Heinlen, for Petitioner.

By the COURT:

Conceding that the terms of office of the Police Commissioners of the city and county of San Francisco have expired, the power of appointment does not devolve upon the Judges of the Superior Court for the city and county aforesaid.

The power of appointment of the Commissioners referred to vested in the Judges of the Fifteenth, Twelfth, and Fourth Judicial Districts of this State by the Act of April, 1878, was not a judicial power, and did not pertain to the judicial system of the State; consequently it was not continued in force by Section 11 of Article XXII of the Constitution now in force, and the power of appointment in question did not devolve on the Superior Judges above mentioned.

Application for writ of mandate denied.

DEPARTMENT No. 2.

[Filed November 21, 1883.]

No. 9061.

ESTATE OF LOHSE.

By the COURT:

Upon consideration of the points submitted in this case, we are of opinion that there is no error in the rulings of the Court below, and the order is therefore affirmed.

IN BANK.

[Filed December 5, 1883.]

No. 10,855.

PEOPLE, RESPONDENT, *v.* LEE HUNG, APPELLANT.

The seventh and ninth instructions asked by defendant's counsel were substantially given in the charge of the Court. Therefore the refusal of the request was not error.

The Court did not err in instructing the jury that it was not necessary to prove that the defendant occupied the building which was burned, or that he was ever at any time the tenant of M. Graff, although it was so alleged in the indictment. The allegation was wholly immaterial, and it was unnecessary to prove it. The refusal to give an instruction the exact reverse of the one given on this point was not error.

It was not error to refuse to give the following: "Arson as a crime against the security of the dwelling house as such and the possession, and not against the building as property." The Court gave the Code definition of arson. That was sufficient.

Judgment and orders appealed from affirmed.

IN BANK.

[Filed December 10, 1883.]

No. 7764.

KNOWLES, RESPONDENT, *v.* SEALE, APPELLANT.

STREET ASSESSMENT—PLANKING—FINDING—ERROR. The Board of Supervisors of San Francisco had jurisdiction, after notice of its intention had been published, to order a street, the grade and width of which had been officially established, planked.

ID. The omission to find upon an immaterial issue is not error.

Appeal from Superior Court, San Francisco County.

Parker, Shafter & Waterman, for Respondent.
Stewart, Van Clief & Herron, for Appellant.

By the COURT:

The allegation of the defendant that the portion of the street which the Board of Supervisors ordered planked had not been graded to the official grade, did not raise a material issue. Therefore the omission to find on it was not error.

The Board had jurisdiction after notice of its intention had been published to order a street, the grade and width of which had been officially established, planked; and it was not denied that the grade and width of this street had been officially established before the Board ordered it planked, or give notice of its intention to order it planked.

Judgment affirmed.

IN BANK.

[Filed December 26, 1883.]

No. 7613.

MORROW v. THE SUPERIOR COURT.

LIABILITY OF STOCKHOLDERS IN LIFE INSURANCE COMPANIES—ACTION MAY BE MAINTAINED IN JUSTICES' COURT. Before the adoption of the present Constitution, one having a claim against a life insurance company, incorporated under the Act of April 22, 1861 (Stats. 1865–6, p. 752), could bring and maintain in the Justices' Court an action against a stockholder in such incorporation, whose proportionate share of such liability would be less than three hundred dollars.

SHARPSTEIN, J., delivered the opinion of the Court:

The principal question in this case is whether, before the adoption of the present Constitution, one having a claim against a life insurance company, incorporated under the Act of April 22, 1866 (Stats. 1865–6, p. 752), could bring and maintain in the Justices' Court an action against a stockholder in such incorporation, whose proportionate share of such liability would be less than three hundred dollars.

Whether he could or not depends very much on the construction to be given to Section 17 of said Act, which is as follows: "Each stockholder of the company shall be individually and personally liable for such proportion of all its debts and liabilities as the amount of its capital stock owned by him bears to the whole of the capital stock."

In the brief of counsel for petitioner it is said that, "In any action to enforce this liability it is necessary that there should be ascertained and determined:

"1st. The amount of capital stock of the corporation.

"2d. The amount of this capital stock owned by each stockholder.

"3d. The total amount of debts and liabilities of the corporation.

"4th. The proportion of such debts and liabilities for which each stockholder is liable."

And it is further said that, "This cannot be done in a common law action."

But if an individual creditor can maintain an action against an individual stockholder for such proportion of the indebtness of the company to such creditor, as the stock of such stockholder bears to the whole of the capital stock of such company, it would only be necessary in such action to ascertain the whole amount of the capital stock of such company; the amount owned by the stockholder sued, and the amount of the indebtedness of the company to the creditor suing such stockholder. This could be done quite as well at law, as in equity.

The first clause of Section 16 of the Act of April 14, 1853, as amended by the Act of April 27, 1863, read as follows: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several action may be prosecuted."

In *Larrabee* v. *Baldwin* (35 Cal. 155), it was said it would not be a strained construction of that clause, standing alone, to hold that a creditor of the company might maintain an action against an individual stockholder on his personal liability, although it "might be open to some doubt, whether it was contemplated that each creditor should be compelled to pursue each stockholder for his individual share of his debt, or whether he might make his money out of the first one he could find, whose liability is sufficient to cover the indebtedness." But after throwing out this intimation, the Court decided the case before it, mainly, if not wholly, on other provisions of the same section.

In the clause last above quoted it is expressly provided that "joint or several actions may be prosecuted," on the stockholder's liability. That provision is not contained in the clause under which the petitioner was sued. But it is expressly provided that each stockholder shall be *individually* and *personally* liable for a proportion of all the debts, and he is necessarily liable for the same proportion of each debt. *All* the debts means *every* debt of the company; and it does seem to us that any creditor is entitled to sue any stockholder for such proportion of the indebtedness of the company to such creditor as the stock of such stockholder bears to the whole capital stock of said company. The stockholder is made *individually*, not *jointly*, liable. And if it should be the misfortune of any stockholder to be sued by each creditor of the company, the aggregate of their several recoveries could not exceed the sum which all might recover in a joint action.

As to the primary liability of the stockholders of the company, for its debts, we entertain no doubt. There is a provision for a guaranty fund, to which recourse may be had after the assets from premiums and other sources, exclusive of capital stock, have been exhausted. But as we construe it, there is nothing in the Act which postpones a creditor's right of action against a stockholder, until after he has exhausted his remedies or any part of them against the company for the recovery of his debt. The liability of the stockholder is, in our opinion, as distinct and separate from that of the corporation, as it would be if the Act had made no provision for any other liability than that of stockholders for the debts of the company.

Judgment affirmed.

We concur: Thornton, J., Myrick, J., Morrison, C. J.

IN BANK.

[Filed December 10, 1883.]

No. 7738.

THE PEOPLE, EX REL PROBERT ET AL., APPELLANTS,

v.

ROBINSON ET AL., RESPONDENTS.

CORPORATION — ELECTION OF TRUSTEES — VOTING SHARES SOLD BUT NOT TRANSFERRED ON THE BOOKS. A transfer of stock of a corporation until entered upon the books of the company confers on the transferee as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company, is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election.

Appeal from Superior Court, San Francisco.

Attorney-General and *Lloyd, Newlands & Wood* for appellants.

Wilson & Wilson and *C. Thornton* for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

This action was brought to oust the defendants from the offices of Trustees of the St. Lawrence Mining Company, and to procure a judgment to the effect that the relators are entitled to said offices. The defendants claim to have been elected at a regular election held on the ninth day of January, 1880, the day on which it is conceded an election of Trustees

might properly be held. But the relators claim that the election is invalid because a majority of the capital stock of said corporation was not represented at said election.

It appears that one Bennett, who appeared by the books of the corporation to be the owner of 37,121 shares, cast the number of votes which that number of shares entitled him to, although he had previously sold 36,000 of said shares to Probert, one of the relators. But such transfer had not been entered on the books of the company. It does not appear that the right of Bennett to vote as he did was challenged, or that Probert attempted or claimed the right to cast the votes which the relators now insist he had a right to cast by virtue of his owning said shares. The validity of the election depends upon the right of Bennett to cast the votes which he might rightfully have cast, if he had not sold said 36,000 shares.

By Section 5 of the Act of 1853, under which the company was incorporated, it is provided that each stockholder shall be entitled to as many votes as he owns shares of stock; and by Section 9 that "the stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid, except between the parties thereto, until the same shall have been so entered on the books of the company, as to show the names of the parties by and to whom transferred; the number and designation of the shares, and the date of the transfer." (Stats. 1853, p. 88.)

A transfer not entered on the books of the company has no validity outside of the parties to such transfer. If not, could it affect the validity of an election at which trustees of the company were elected? If so, would not a transfer, although not entered on the books of the company, be valid outside of the parties to such transfer? The construction which we feel compelled to give to this clause is, that a transfer of stock until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company, is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election. (*State* v. *Ferris*, 42 Conn. 580; *Hopkins* v. *Buffum*, 9 R. I. 513; *Gilbert* v. *Manufacturing Iron Co.*, 11 Wend. 627; *Bank of Utica* v. *Smalley*, 2 Conn. 770; *Kirtright* v. *Bank of Buffalo*, 22 Wend. 348: *State* v. *Petinelli*, 10 Nev. 141.)

"As between a corporator and the corporation, the records of the corporation, or its stock-book, as it is called, is the evidence of their relation. Meetings of the stockholders, *elections* and dividends, etc., are regulated by this record. The certificate is but secondary evidence, and is never demanded except when the stockholder deals with the corporation in a contract relation." (Bank of Commerce's Appeal, 73 Pa. 59.)

Whatever rights the purchaser of a certificate of stock may acquire as between himself and his vendor, it is well settled as between himself and the corporation he acquires only an equitable title, and until he secures a transfer on the books of the company he is not a stockholder, and has no claim to act as such. (*N. Y.* and *N. H. R. R. Co.* v. *Schuyler*, 34 N. Y., 80; *Grymes* v. *Hone*, 49 *id.* 17.)

We could not hold that this election was invalid by reason of Bennett's voting as he did without holding that, as between him and Probert and the company, the transfer without being entered on its books was valid. This would be going farther than the law, as we construe it, would justify us in going.

The conclusion at which we have arrived renders it unnecessary to consider the question raised by the appeal of the plaintiff and relators, Probert, Myer and Myer.

So much of the judgment as adjudges that defendants S. L. Robinson, E. N. Robinson and Hale Rix are not entitled to the offices of trustees of the said corporation and that they and every one of them be ousted and excluded from the said offices, and that they and each of them do not intermeddle with or concern themselves in or about the offices of trustees of the St. Lawrence Mining Company, or the liberties, privileges and franchises thereunto belonging; but that they and each of them, be forejudged absolutely and excluded from exercising or using the same, or any of them, for the future, is reversed; in other respects affirmed.

We concur: Ross, J., McKinstry, J., Morrison, J., McKee, J.

CONCURRING OPINION.

The Court found that the stock voted by Bennett at the meeting of January, 1880, stood in his name, and that at such meeting no objection was made to his casting the votes of the stock so standing in his name. Under such circumstances I do not think the voting was void; nor that it vitiated the election. I therefore concur in the judgment.

MYRICK, J.

In the Superior Court of the County of Alameda, State of California.

DEPARTMENT NO. 3.

IN RE WOO YECK ON HABEAS CORPUS.

CONSTITUTION — LAUNDRY ORDINANCE OF SAN FRANCISCO. The Laundry Ordinance of the city and county of San Francisco No. 1719 is unreasonable, unjust, discriminating, unauthorized by law and void.

Alfred Clarke for Respondent.
Thos. D. Riordan for Petitioner.

N. HAMILTON delivered the opinion of the Court:

The petitioner, Woo Yeck, in whose behalf the writ was granted by the Supreme Court of this State, returnable before the undersigned Judge of the Superior Court of Alameda County, Department 3, for hearing and determination of the matters alleged, and the same having been heard and tried, and the matters having been argued by the attorneys on behalf of the municipality and on behalf of petitioner, and the respective attorneys having filed their briefs, and the matter having been submitted for decision, and having been duly considered, the following decision is rendered, to wit:

The petitioner is in custody of Patrick Crowley, as Chief of Police of the city and county of San Francisco, upon process issued out of the Police Court of said city and county, upon a complaint filed therein charging said Woo Yeck with misdemeanor, for having, as is alleged, violated Section 4 of Order No. 1719 of the Board of Supervisors of said city and county, entitled "An Order Regulating the Establishment and Maintenance of Public Laundries and Public Wash-houses in the city and county of San Francisco," said Section 4 is as follows:

SECTION 4. No person or persons owning or employed in the public laundries or public wash-houses provided for in Section 1 of this Order shall *wash* or *iron* clothes between the hours of 10 o'clock P. M. and 6 o'clock A. M., nor upon any portion of that day known as Sunday.

The complaint charges that said Woo Yeck, on or about the 28th day of August, A. D. 1883, committed a misdemeanor by violating that portion of said Section 4, which forbids any of the persons named therein from washing or ironing clothes between the hours of 10 o'clock P. M. and 6 o'clock A. M.

The question argued and sought to be determined is as to the validity of said Section 4 of said Order.

It may be conceded that if there is anything in the nature of this business itself, or the mode of conducting it, that makes it or causes it to become a nuisance, as nuisance is defined by the general laws of the State, in the Penal Code, the Civil Code and Code of Civil Procedure, *and in no other case*, then the Board of Supervisors of said city and county are empowered by the Consolidation Act and the New Constitution by proper Order to prevent or summarily remove such nuisances, or they may pursue the remedies for their abatement provided in said Codes.

But if there be nothing in the business itself nor in the mode in which it is carried on to constitute it a nuisance, as defined by the Codes aforesaid, and all the regulations of the municipal corporation to secure protection from fire, to preserve the health of the community by having proper sewerage, so that neither the public peace, health, morals or safety of the community is endangered thereby, have been complied with, by the person or persons owning or carrying on the business, or employed therein, then neither the municipality of San Francisco, nor the Legislature of the State, nor any other power under this Government, can go farther and interfere with the business by prescribing the hours within which portions of said business shall or shall not be carried on, and during which laborers employed therein shall or shall not labor. An Order of the Board of Supervisors that attempts this, as is the order in question, is an unjust, unreasonable and unwarrantable interference with the natural and inalienable right of every individual under this government to life, liberty and the pursuit of happiness, and to acquire, hold and enjoy property, rights never surrendered to government, which are fully recognized and protected by the Constitution of the United States and of this State, and in order to acquire property or to obtain an honest livelihood, such individual may labor during any hours of the day or night as he may voluntarily select, or his necessities may force him to employ. If this ordinance can be sustained as to the laundry business, then a similar order can be enforced as to every business, and the Board of Supervisors of San Francisco may as well enter the printing establishments and prescribe the hours of the day or night within which it shall be unlawful to set type, or run their presses, and thus create confusion confounded; or if this business be selected for such regulation on account of the noise attending the washing and ironing of clothes, as contended by counsel for the

municipality, why not, as more noisy, have forbidden the entry into the city before sunrise of meat wagons, vegetable and milk wagons, and forbid the various manufactories that run day and night from operating, or stop the steam-engines, and forbid the running of railroad trains during certain hours of the night; or why not require the various places of amusement and saloons to close business after 10 o'clock P. M., or, in fact, enter into and regulate the hours and modes of work of any laborer or business carried on in the city.

I am of the opinion that Section (4) of said Order No. 1719 is unreasonable, unjust, discriminating, unauthorized by law and void.

It follows, the defendant is unlawfully restrained of his liberty and must be discharged, and it is so ordered and the writ dismissed.

In the Supreme Court of the United States.

No. 99—OCTOBER TERM, 1883.

ABRAHAM B. MILLER, APPELLANT,

v.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, THE CITY OF BROOKLYN, ET AL.

INJUNCTION AGAINST OBSTRUCTING NAVIGABLE STREAM. Where the State Legislature and the Federal Government have authorized or sanctioned the erection of a bridge across a navigable stream, an injunction by a private individual will not lie to restrain the erection, although it would obstruct navigation. The powers which control and regulate the use of the stream had made the structure a lawful one.

Appeal from the Circuit Court of the United States for the Southern Distict of New York.

November 26, 1883.

MR. JUSTICE FIELD delivered the opinion of the Court.

This suit was commenced in May, 1876, to restrain the erection of the suspension bridge, then under construction, over East River, in the State of New York, between the cities of New York and Brooklyn, at the height of 135 feet

above the river at high-water mark, which was the proposed elevation of the structure. As the bridge has since been completed, if the plaintiff can make good his contention, and establish that when he filed his bill he was entitled to the relief prayed, he may claim that the bridge shall be raised to a greater elevation, or be entirely abated. He is the lessee of certain warehouses on the banks of the river above the point of the proposed crossing of the bridge, and he states that he brings the suit on behalf of himself and of all others similarly situated. No one, however, has united with him in its prosecution. He stands alone as complainant, and alleges that the bridge, if erected as projected and intended to the height designated, would be built without lawful power and authority; that it would be a nuisance, and obstruct, impair, and injuriously modify the navigation of the river, and might seriously and prejudicially affect the commerce of the port of New York; that merchant vessels from the New England States and British Provinces, and from ports south of New York, and vessels engaged in foreign commerce, pass and repass on the river the intended location of the bridge; that the masts of a large proportion of these vessels exceed 135 feet in height; and that the expense to them of striking parts of their masts in passing under the bridge, if built as proposed, with the detention and additional towage rendered necessary, would be so great as to destroy his warehouse business and be a private and irreparable injury to him, for which an action at law would afford no adequate redress. He accordingly prays an adjudication of the Court upon the character and effect of the proposed bridge in conformity with these allegations, and an injunction restraining the further prosecution of the work of building it at the height of 135 feet above mean high water, or at any other height that would obstruct, impair, or injuriously modify the navigation of the river.

The Court below did not find in the allegations of a possible loss to the plaintiff in his warehouse business, or in the proofs offered to sustain them, sufficient ground to restrain the completion of the work. It dismissed his complaint as being without substantial merit.

We approve of its action and decree. The erection of the bridge at the elevation proposed was authorized by the action of both the State and Federal governments. It would, therefore, when completed, be a lawful structure. If, as now completed, it obstructs in any respect the navigation of the river it does so merely to an extent permitted by the only authorities which could act upon the subject. And the in-

jury then apprehended, and alleged by the plaintiff and now sustained, is only such as is common to all person engaged in commerce on the river and doing business on its banks, and, therefore, not the subject of judicial cognizance. These conclusions will clearly appear by a reference to the legislation under which the work was commenced and prosecuted.

On the 16th of April, 1867, the legislature of New York passed as act creating a corporation by the name of the New York Bridge Company for the purpose of constructing and maintaing a permanent bridge over East River, between the cities of New York and Brooklyn. (Laws of 1867, chapter 399.) The act, among other thing, authorized the corporation to acquire and hold so much real estate as might be necessary for the site of the bridge, and of all piers, abutments, walls, toll-houses, and other structures proper to it, and for the opening of suitable avenues of approach, but no land under water beyond the pier lines established by law. It declared that the bridge at the middle of the river should not be at a less elevation than 130 feet above high tide and should not be so contructed as to obstruct "the free and common navigation of the river;" that it should not obstruct any street it might cross, but span such street by an arch or suspended platform of suitable height to afford passage under it for all purposes of public travel and transportation; and that no street running on the line of the bridge should be closed without full compensation to the owners of the property upon it; and designated the points of the commencement and termination of the bridge.

On the 20th of February, 1869, the Legislature passed an Act amending the Act of incorporation and providing for the representation of the two cities of New York and Brooklyn in the Board of Directors of the Bridge Company, and directing that the company should proceed without delay to construct the bridge, authorizing it for that purpose to use and occupy so much of the lands under the water of the river, not exceeding a front on either side of 250 feet, nor extending beyond the pier lines, as might be necessary for the construction of the towers of the bridge.

On the 3d of March of the same year, Congress passed an Act entitled "An Act to establish a bridge across East River between the cities of Brooklyn and New York, in the State of New York, [as] a post road." In it the Acts of the Legislature of New York are referred to, and the bridge to be constructed under them was declared to be "a lawful structure and post road for the conveyance of the mails of the

United States," provided the bridge should be so constructed and built as "not to obstruct, impair, or injuriously modify the navigation of the river." To secure a compliance with this condition, the company was required, previous to commencing the construction of the bridge, to submit to the Secretary of War a plan of it, with a detailed map of the river at its proposed site and for the distance of a mile above and below, exhibiting the depths and currents of the stream, together with such other information as might be deemed requisite by the Secretary to determine whether the bridge, when built, would conform to the prescribed conditions of the Act "not to obstruct, impair, or injuriously modify the navigation of the river."

The Secretary of War was by the Act authorized and directed, upon receiving the plan and map. and other information, and upon being satisfied that a bridge built on such plan and at said locality would conform to these conditions, to notify the company that he approved the same; and, upon receiving such notification, the Act declared that such company might proceed to the erection of the bridge, conforming strictly to the approved plan and location. But until the Secretary approved the plan and location, and notified the company of the same in writing, the bridge should not be built or commenced.

Soon after the passage of this Act the company had the required plan and maps prepared and submitted to the Secretary of War. It is conceded that in this respect the provisions of the Act were complied with. The Secretary then appointed a commission of engineers, consisting of three officers of the army, two of them having the rank of lieutenant-colonel of engineers, and the third a captain of engineers, to examine and report upon the proposed bridge, its height, strength, plan, location, and practicability, the effect of its piers and foundations and abutments upon the navigation of the river and the approaches to the harbor, and to what extent the bridge might obstruct or interrupt the passage of vessels and the free access to the United States navy-yard at Brooklyn. The commission heard all parties interested, and made an elaborate report upon the subject to the chief engineer of the United States army, at Washington, and through him the report was submitted to the Secretary of War. A majority of the commission was of opinion that the height of the centre of the main span of the bridge above high water should be increased from 130 to 135 feet. They also made various recommendations with reference to the dimensions and strength of various parts of the structure,

to the projection of the pier or tower foundations of the bridge, and to the attachment of guys or stays to its main span. They reported as their conclusions:

1. That there was no doubt of the entire practicability of the structure, nor of its stability when completed.

2. That no sensible effect would be produced by the pier or tower foundations and abutments upon the navigation of the river, or upon the approaches to the harbor of New York.

3. That the bridge would not offer any important impediment to the free access of naval vessels to the United States navy-yard at Brooklyn, nor any obstruction or interruption to the passage of merchant vessels under it, further than requiring the larger class of ships to send down or house their royals, and in some cases their top-gallant masts.

4. That the bridge, as projected, would conform to the prescribed conditions of the Act of Congress relating to it, unless it be decided that the words "obstruct or impair" implied that it should not necessitate any such preparation for passing it, on the part of vessels of the larger class, as is involved in housing or sending down of top-gallant, royal or sky-sail masts.

On the 19th of June, 1869, the Secretary of War approved the report of the commission with the views and recommendations it contained, provided that the height of the centre of the main span of the bridge should not be less than 135 feet in the clear at mean high water of the spring tides, and that the structure should conform in all other respects to the conditions recommended by the commission. The Secretary also directed the chief of engineers to furnish the bridge company with a copy of the Act of Congress establishing the bridge, a copy of the report of the commission and of his own report, and to notify the company that the span and location of the bridge were approved subject to the conditions mentioned.

This action of the Secretary was endorsed on the report. In accordance with his direction, the chief engineer notified the company of the approval of the Secretary and of the conditions which accompanied it. Upon receiving the notification the company commenced the construction of the bridge and prosecuted the same until the year 1875, when the Legislature of the State passed an Act dissolving the the company and declaring the bridge to be a public work of the cities of New York and Brooklyn, and providing for its completion by them. It is conceded by stipulation of the parties that the provisions of this Act were complied

with and that the management of the work was devolved upon trustees to be appointed by the two cities. When this suit was commenced, the work had progressed so far that the towers and achorages on both sides of the river had been completed and upwards of $6,000,000 had been expended; and, as already said, since that time the bridge has been completed and opened to the public.

It is contended by the plaintiff with much earnestness that the approval of the Secretary of War of the plan and location of the bridge was not conclusive as to its character and effect upon the navigation of the river, and that it was still open to him to show that, if constructed as proposed, it would be an obstruction to such navigation, as fully as though such approval had not been had. It is argued that Congress could not give any such effect to the action of the Secretary, it being judicial in its character. There is in this position a misapprehension of the purport of the Act. By submitting the matter to the Secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particulcr height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The Act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an Act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the Act shall take effect

may be left to such agencies as it may designate. (*South Carolina* v. *Georgia*, 93 U. S. 13.)

It is also objected that the notice given by the chief engineer to the company was not a compliance with the requirements that notification should be given by the Secretary; but there is no force in the objection. When a Secretary of the Government is required to give information on any subject, he may act, and generally does act, through officers under him. He is not expected to make over his own signature all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication is deemed made by him when it is made under his sanction and direction.

The bridge being constructed in accordance with the legislation of both the State and Federal Governments must be deemed a lawful structure. It cannot after such legislation be treated as a public nuisance; and however much it may interfere with the public right of navigation in the East River, and thereby affect the profits or business of private persons, it cannot, on that ground, be the subject of complaint before the Courts. The plaintiff is not deprived of his property nor of the enjoyment of it; nor does he from that cause suffer any damage different in character from the rest of the public. He alleges that his business of a warehouse-keeper on the banks of the river above the bridge will be in some degree lessened by the delay attending the passage under it of vessels with high masts. The inconvenience and possible loss of business from this cause are not different from that which others on the banks of the river above the bridge may suffer. Every public improvement, whilst adding to the convenience of the people at large, affects more or less injuriously the interests of some. A new channel of commerce opened, turning trade into it from other sourses, may affect the business and interests of persons who live on the old routes. A new mode of transportation may render of little value old conveyances. Every railway in a new country interferes with the business of stage coaches and side-way taverns; and it would not be more absurd for their owners to complain of and object to its construction than for parties on the banks of the East River to complain of and object to the improvement which connects the two great cities on the harbor of New York.

Several cases have been before this Court relating to bridges over navigable waters of the United States in which

questions were raised as to the authority by which the bridges could be constructed, the extent to which they could be permitted to obstruct the free navigation of the waters, and the right of private parties to interfere with their construction or continuance. In these cases all the questions presented in the case at bar have been considered and determined, and what we hereafter say in this opinion will be little more than a condensation of what was there declared. The power vested in Congress to regulate commerce with foreign nations and among the several States includes the control of the navigable waters of the United States so far as may be necessary to insure their free navigation; and by "navigable waters of the United States" are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the States. (*The Daniel Ball*, 10 Wall., 557.) East River is such a navigable water. It enters the harbor of New York and connects it with Long Island Sound. Whatever, therefore, may be necessary to preserve or improve its navigation the General Government may direct; and to that end it can determine what shall and what shall not be deemed an interference with or an obstruction to such navigation.

In the Wheeling Bridge case a bridge erected over the Ohio River at Wheeling, under an Act of the Legislature of Virginia, which prevented the passage of steamboats with high chimneys, was adjudged to be an unlawful structure; and the Court ordered that it should be raised so as to afford a free passage to the steamers, or that some other plan should be adopted by a day designated which would relieve the navigation from the obstruction, or that the bridge should be abated. Congress thereupon interfered and declared the bridge, as it was built at its existing elevation, to be a lawful structure. The Court then held that the objection to the bridge as an obstruction to the navigation of the river was removed; that although it might still be an obstruction in fact, it was not so in contemplation of law, and the decree of the Court for the abatement of the bridge could not be enforced. "There was no longer," said the Court, "any interference with the enjoyment of the public right, inconsistent with the law, no more than there would be where the plaintiff himself had consented to it after the rendition of the decree." For its interference with the public use of the stream no individual could complain, as the power which could control and regulate that use had made the structure creating the interference a lawful one. (18 Howard, 430.)

The case of *Gilman* v. *Philadelphia* (3 Wallace, 713) is much stronger than the Wheeling Bridge case, and is conclusive against the pretensions of the plaintiff. It there appeared that a bridge was about to be built over the Schuylkill River at Chestnut street in the city of Philadelphia, under the authority of an Act of the Legislature of Pennsylvania, when a party owning valuable coal wharves just above Chestnut street filed a bill to prevent its erection, alleging, as in the present case, that it would be an unlawful obstruction to the navigation of the river and a public nuisance, inflicting upon him special damage, and claiming that he was entitled to be protected by an injunction to restrain the progress of the work, and to a decree of abatement should it be completed. The river was tide water and navigable to the wharves of the plaintiff by vessels drawing from 18 to 20 feet of water; and, for years, commerce to them had been carried on in all kinds of vessels. The bridge was to be only 30 feet high and without draws, and, of course, would cut off all ascent above it of vessels carrying masts. The city justified its intended action under the Act of the Legislature, setting up that the bridge was a necessity for public convenience to a large population residing on both sides of the stream. The Court below dismissed the bill, and this Court affirmed its decree, holding that as the river was wholly within her limits, the State could authorize the construction of a bridge until Congress should by appropriate legislation interfere and assume control of the subject. In giving its opinion the Court observed, that it should not be forgotten, that bridges which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation as well as navigable waters, and that the commerce over them may be greater than on the water; that it was for the municipal power to determine which should be preferred and how far either should be made subservient to the other; and that this power could be exercised by the State until Congress interfered and took control of the matter. All the considerations which governed the decision of that case operate with equal, if not greater, force in the present case. In that case different parts of a city, separated by a navigable water, were connected by a bridge; in this case two cities thus separated are united. In that case the obstruction was complete and permanent to all vessels having masts; in this case the obstruction does not exist except to a limited class of vessels having high masts, and to them it is little more than a temporary inconvenience. In that case there was no

approval of the structure by Congress, except such as may be inferred from its silence; in this case there is its direct authorization of the bridge after a careful consideration of its effects upon navigation by a commission of distinguished engineers. In that case the bridge was held to be a lawful structure against all private parties, the Federal Government alone having the right to object to the obstruction to the navigation of the river which it might cause, and to remove it; in this case that Government does not object, but approves and sanctions the structure; and the public benefit from it far outweighs any inconvenience arising from its interference with the navigation of the stream.

The recent case of *Escanaba Company* v. *Chicago* (107 U. S. 678) follows the decision in *Gilman* v. *Philadelphia*, and is equally pointed and decisive.

In the light of these cases (and others of the same purport might be cited) the claim of the plaintiff that the construction of the great work was to connect, and which has since then connected, the cities of New York and Brooklyn, should have been suspended, appears to be wholly without merit.

The decree of the Court below dismissing his bill must, therefore, be affirmed; and it is so ordered.

Nos. 671 and 815—OCTOBER TERM, 1883.

RELIEF JACKSON, PLAINTIFF IN ERROR,

v.

JOHN D. ROBY AND JAMES D. RANKIN,

AND

JOHN D. ROBY AND JAMES D. RANKIN, PLAINTIFFS IN ERROR,

v.

RELIEF JACKSON.

In error to the Circuit Court of the United States for the District of Colorado.

December 3d, 1883.

MINING CLAIM—EXPENDITURE ON ONE CLAIM MUST BENEFIT ALL. The Act of 1872, (17 U. S. Rev. Stats., Chap. 152, Sec. 5) which provides that where several mining claims are held in common, the annual expenditures required by the Act, may be made upon any one of them, must be construed to mean that the work or expenditure must be for the purpose of developing all the claims. It does not mean that the expenditure upon one claim—which has no reference to the development of the others—will answer.

Mr. Justice FIELD delivered the opinion of the Court:

Previous to the legislation of Congress in 1866, mining claims upon the public lands of the United States were held under rules framed by miners themselves in different localities. These rules prescribed the extent of ground which miners could severally appropriate for mining, and the conditions upon which such ground could be acquired and held. They bore a general similarity in different districts, varying only according to the extent and character of the mines. They all agreed in one particular, in recognizing discovery and appropriation as the source of title and development, by working as the condition of continued possession. The first discoverer could derive no benefit from his discovery unless he followed it up by work for the development of his claim; and what work that should be, the nature and extent of it, how soon it should commence after the discovery, and when its suspension should be deemed an abandonment of the claim, were specifically declared.

The Act of Congress of 1866, gave the sanction of law to these rules of miners so far as they were not in conflict with the laws of the United States. (14 Stats. Chap. 262, Sec. 1.) Subsequent legislation specified with greater particularity the modes of location and appropriation and extent of each mining claim, recognizing, however, the essential features of the rules framed by miners, and among others that which required work on the claim for its development as a condition of its continued ownership. The Act of 1872 – and its provisions are re-enacted in the Revised Statutes—declares that on each claim subsequently located, until a patent for it is issued, there shall be annually expended for labor or improvements $100, and on claims previously located an annual expenditure of $10 for each one hundred feet in length along the vein; and provides that when such claims are held in common, the expenditure may be upon any one of them. And it declares that upon a failure to comply with these conditions the claim shall be opened for re-location in the same manner as if no location of the same had ever been made, provided the original locators, their assigns, or representatives, have not resumed work upon it after failure and before re-location. (17 Stats. Chap. 152, Sec. 5.)

The Act also points out various steps which must be followed by a party who seeks to obtain a patent for his mining claim. Among other things he must file an application in the proper land office under oath, showing a compliance

with the law, together with a plat and the field notes of his claim or claims made under the direction of the Surveyor-General of the United States, showing its or their boundaries. He must also at the time, or within sixty days thereafter, file with the register a certificate of the Surveyor Geneneral that $500 worth of labor has been expended, or improvements to that amount have been made upon the claim by himself or grantors. If within sixty days thereafter an adverse claim is filed, accompanied by the oath of the party making it, showing its nature, boundaries, and extent, proceedings are to be stayed until the controversy has been settled by the decision of a Court of competent jurisdiction, or the adverse claim is waived. And it is made the duty of the adverse claimant, within thirty days afterwards, to commence legal proceedings to determine the question of the right of possession.

In this case it appears that the defendants claimed the premises in controversy as their mining ground, and made application for a patent. The premises are situated on Blue River, in the county of Summit, in the State of Colorado, and embrace twenty-three acres and forty-eight hundredths of an acre. The plaintiff asserted an adverse right to them as part of what is called in the record "The Thomas Klak Claim," and brought the present action to determine his right of possession. In his complaint he alleges that on the 9th of August, 1876, he was the owner of the Klak claim, and ever since has been such owner and entitled to its possession; that he worked the same as a placer mining claim in connection with other claims adjacent and contiguous to it; that the defendants some time in 1880 entered upon a part of said claim—that portion now in controversy—and have ever since wrongfully withheld its possession from him. He avers that the premises are worth $50,000; that the action is brought in support of his adverse claim; and he asks judgment for possession of the premises.

The defendants, besides denying the allegations of the plaintiff, set up a right to a portion of the premises by location and occupation under the mining rules of the district, and to the remainder by purchase from the original locators.

On the trial the plaintiff produced and gave in evidence a certificate of location of the Klak claim made by his grantors in 1869, and also showed that they were owners of claims in what is called Lomax Gulch, adjoining and contiguous to the Klak claim, and began to work such adjoining claims in 1872, and continued the work until and during 1880; that in prosecuting the work they used a flume which extended over

the premises in conntroversy a distance of one hundred and fifty feet, by means of which the tailings from the Lomax Gulch—that is, the waste material—were carried and deposited on the premises, so that at the end they covered a greater portion of them—more than one-third thereof. From them the plaintiff traced his title. With the exception of the extension of the flume over the premises, and their use as a place of deposit for the waste material from the adjoining claims, it was not shown that either he or his grantors ever did any work upon them, or ever had possession of them. He insisted, however, that this extension of the flume and use of the premises were sufficient to give him the right of possession under that clause of the statute which provides that where several mining claims are held in common the labor or expenditure required may be made on any one of them. The Court below held, and so instructed the jury, that these facts were insufficient to establish any possession or right of possession in him, and that therefore he was not entitled to a verdict.

The defendants proved the location in July, 1880, of a portion of the premises in controversy, then vacant and unoccupied, and a purchase of the remainder from previous locators; but they gave no evidence that any work on the claim was done by themselves or their grantors; and the Court held that they had not established a title for the consideration of the jury, who were directed so to find. The jury brought in a verdict that neither party had proven title to the property. The effect of this verdict was to leave the defendants, who had applied for a patent, without any right to it, so far as the premises in controversy were concerned, and to leave the plaintiff in no better situation.

The contention of the plaintiff was made upon a singular misapprehension of the meaning of the Act of Congress, where work or expenditure on one of several claims held in common is allowed, in place of the required expenditure on the claims separately. In such case the work or expenditure must be for the purpose of developing all the claims. It does not mean that all the expenditure upon one claim—which has no reference to the development of the others—will answer. As was said in *Smelting* v. *Kent:* "Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several when the labor is performed, or the improvements are made for its development, that is to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on

ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream or the introduction of water, or where the improvement consists of the construction of a flume to carry off the debris or waste material." (104 U. S. 655.)

It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of different locations to combine and to work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them. The law does not apply to cases where several claims are held in common, and all the expenditures made are for the development of one of them without reference to the development of the others. In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures required may be made, or the labor be performed upon any one of them.

The language as to the construction of a flume to carry off the debris or waste material at the conclusion of the citation above, has reference to such a structure as may be used to carry off the common debris of several claims, not to a flume used merely to remove the debris of one claim. Here no work was done for the general improvement of all the claims. The deposit of the debris from the Lomax Gulch on the premises in controversy, so far from tending to develop them, imposed obstacles in the way of their development, by covering them up with refuse matter.

There having been no work done by either claimant, plaintiff or defendants, on the premises in controversy, the Court properly instructed the jury to find against both.

Judgment affirmed.

True copy.

New Law Publications.

WARVILLE ON ABSTRACTS: By George W. Warville of the Chicago Bar. Callaghan & Company, Chicago, Publishers.

This is a practical treatise on Abstracts and Examinations of Title to Real Property. It is an epitone of the questions of law that arise during the making and perusal of an abstract, giving

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COLEBROOKE ON COLLATERAL SECURITIES: By Wm. Colebrooke. Callaghan & Company, Chicago, Publishers.

This is a treatise on the law of Collateral Securities as applied to the gotiable, quasi-negotiable, and non-negotiable Clauses in Action. This is a very much needed work. The author has treated it with great accuracy and thoroughness, present a complete citation of cases (one four thousand in number) directly relating to the law of collateral security.

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INDEX.


3 6105 063 154 780